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Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF NEW YORK; DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT OF NEW YORK CITY; CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Petitioners,

- against -

KAM SHING CHAN, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

O. PETER SHERWOOD,
Corporation Counsel of the
City of New York,
Attorney for Municipal Petitioners
100 Church Street,
New York, N.Y. 10007.
(212) 788-1034

LEONARD J. KOERNER,*
PAMELA SEIDER DOLGOW,
JOHN WOODS,
GOODWIN BENJAMIN,
FAY NG,
of Counsel.

KAYE, SCHOLER,
FIERMAN, HAYS, & HANDLER,
Attorneys for Petitioner
Chinese-American
Planning Council, Inc.,
425 Park Avenue
New York, N.Y. 10022.
(212) 836-8000

PETER A. WALKER,
JAY W. WAKS,
BRIAN G. CESARATTO,
of Counsel.

September 30, 1993

* Counsel of Record

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1230, 1231, 2194—August Term, 1992

(Argued: March 8, 1993 Decided: July 26, 1993)

Docket Nos. 92-9236, -9238, 93-7038

KAM SHING CHAN, KAM TAI CHAN, JING YI CHEN, SHAN NON CHIU, BAK LOK CHU, KOK KUN CHU, ISRAEL GONZALEZ, SUI BIN HUANG, JIAN NING JIANG, KAM FAI KWOK, MOON SHUEN KWONG, WEI XIANG LEE, YANG I LEE, YOUNG SHI LEE, BING ZHAO LI, HAO HUI LI, KEI MAN LI, WAI TAI LI, CHI KWONG LIU, JACK YE LOUIE, SHENG HUA LU, TIAN GUANG MAI, CHEUK MINK NG, KIN CHUNG NG, KIN HIN NG, SHUN GAO SHEN, TEN JEN SHEN, HAU WING SIN, VEIN DINH SINTRUONG, WING SHING TSE, WAI MAN WAN, KONG HTYAN WU, XU MING WU, GUO XUAN and YUE NAM ZHU,

Plaintiffs-Appellees-Cross-Appellants,

—v.—

CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT OF NEW YORK CITY and CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Defendants-Appellants-Cross-Appellees.

B e f o r e :

KEARSE and CARDAMONE, *Circuit Judges*, and BURNS, *District Judge**.

Appeal from order of the United States District Court for the Southern District of New York, Robert J. Ward, *Judge*, denying motion to dismiss portion of complaint for failure to state a claim under 42 U.S.C. § 1983; cross-appeal from judgment dismissing portion of complaint for failure to state a claim under 42 U.S.C. § 5310. *See* 803 F. Supp. 710 (1992).

Affirmed.

JAMES REIF, New York, New York (Ellen Dichner, Gladstein, Reif & Meginniss, Shneyer & Shen, Asian American Legal Defense & Education Fund, New York, New York, on the brief), *for Plaintiffs-Appellees-Cross-Appellants*.

FAY NG, New York, New York (O. Peter Sherwood, Corporation Counsel, City of New York, Pamela Seider Dolgow, John P. Woods, Goodwin E. Benjamin, New York, New York, on the brief), *for Defendants-Appellants City of New York and Department of Housing Preservation & Development of New York City*.

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* Honorable Ellen Bree Burns, of the United States District Court for the District of Connecticut, sitting by designation.

PETER A. WALKER, New York, New York (Jay W. Waks, Brian G. Cesaratto, Kaye, Scholer, Fierman, Hays & Handler, New York, New York, on the brief), *for Defendant-Appellant Chinese-American Planning Council, Inc.*

KEARSE, *Circuit Judge*:

Defendants City of New York ("City"), Department of Housing Preservation & Development of New York City ("HPD") (collectively "municipal defendants"), and the Chinese-American Planning Council, Inc. ("CPC"), appeal from so much of an order of the United States District Court for the Southern District of New York, Robert J. Ward, *Judge*, as denied their motions pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss claims of plaintiffs Kam Shing Chan *et al.*, asserted under 42 U.S.C. § 1983 (1988) for payment of subminimum wages, in violation of § 5310 of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.* (1988 & Supp. II 1990) ("HCDA" or the "Act"). The district court ruled that although there is no private right of action directly under § 5310, plaintiffs' claims for violation of that section could be pursued under § 1983. On appeal, defendants contend principally (a) that § 5310 does not create a right that can be enforced under § 1983, and (b) that a § 1983 action cannot be maintained because CPC cannot be considered a state actor. Plaintiffs cross-appeal, challenging the district court's ruling that § 5310 affords them no private right of action directly under that section. For the reasons below, we reject these challenges and affirm in all respects.

I. BACKGROUND

Plaintiffs were employees of CPC who worked on federally funded construction projects. The present controversy arises out of their claims that CPC paid them less than the minimum wage rates federally required for such projects. For purposes of both the appeal and the cross-appeal, we accept as true the allegations of the First Amended Verified Complaint ("Complaint"), as clarified by the actual terms of the contracts invoked by the Complaint and presented to the district court, *see Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1561 (1992).

A. *The Contracts Between CPC and HPD*

From 1986 to 1989, CPC was party to a series of three contracts with HPD for the construction, repair, and rehabilitation of certain housing owned by the City (collectively the "Contracts"). The Contracts were funded in whole or in part by federal grants under the HCDA. Section 5310 of that Act provides generally that laborers employed on construction work financed in whole or in part by HCDA grants "shall be paid wages at rates not less than those prevailing on similar construction in the locality" as determined by the Secretary of Labor (hereinafter "federally recognized prevailing rates") in accordance with the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1988) ("Davis-Bacon"). *See* 42 U.S.C. § 5310.

The Contracts between CPC and HPD contained certain terms and conditions required by the HCDA. One such provision, entitled "Federal Supplemental Terms and Conditions," stated that

> [t]he Contractor acknowledges that this Agreement is funded under a program providing direct financial assistance from the Federal government to the City and HPD and is subject to, and the Contractor shall comply with, the requirements of all applicable Federal Statutes, rules and regulations, including, but not limited to, those set forth in Exhibit F attached to this Agreement.

(1986–87 Contract, Article 18, ¶ 18.1.) Exhibit F specified that the Contracts were subject to the conditions of, *inter alia*, the HCDA and Davis-Bacon:

> The Davis-Bacon Act: In construction contracts involving an excess of $2000, unless exclusively in connection with the rehabilitation of a structure designed for residential use by less than 8 families, all laborers and mechanics must be payed at a rate not less than those determined by the Secretary of Labor to be prevailing for the locality, which rates are annexed hereto as Exhibit A. These wage rates are a federally mandated ***minimum*** . . . .

(1986–87 Contract, Exhibit F, Article 3(b)(i) (emphasis in original).)

Each Contract was awarded following the submission of bids in response to HPD's Requests for Proposals ("RFPs"). The RFPs, which were incorporated in the Contracts, contained express provisions with respect to the wages to be paid workers on projects covered by the Contracts. For example, the RFP for the 1986–87 Contract stated:

> A Person-Day Rate, which shall be all inclusive of costs within each Proposal, will be the proper method of establishing the overall budget. For example, if

> $75.00 is the Person-Day Rate, all costs to run the program, pay the staff and trainees and provide training equipment and administrative services would be covered by said rate multiplied by the number of trainees multiplied by the number of days worked.

(1986–87 RFP General Guidelines ¶ 1 (emphasis omitted).) This RFP also provided that "[t]here shall be 246 work days in the term of the Contract" (*id.* ¶ 6 (emphasis omitted)), and that "[a] maximum Person-Day Rate is being set at $90.00" (*id.* ¶ 2). The Contract prohibited CPC from receiving any additional funding for "Program Work performed pursuant to this Agreement." (1986–87 Contract, Article 15, ¶ 15.2.)

CPC bid for and won the 1986–87 Contract with a budget that called for 30 trainees working 246 days at the $90 Person-Day Rate. The total contract price was thus $664,200. The 1988 and 1989 Contracts awarded to CPC were similar, though the RFPs permitted, and the Contracts called for, Person-Day Rates of $95.

B. *The Present Lawsuit and the District Court's Decision*

In 1990, plaintiffs commenced the present action, alleging that they were CPC employees who had performed construction, repair, or rehabilitation work on the projects covered by these Contracts and that from September 1986 to December 1989, (1) the wage rates specified in the Contracts were lower than the then-current federally recognized prevailing rates, and (2) CPC paid plaintiffs at rates even lower than those specified in the Contracts. The Complaint alleged that HPD "knowingly consented to, condoned, authorized, acquiesced in, and acted with deliberate indifference to, the repeated failures and refusals of CPC to pay plaintiffs at the federally mandated

prevailing wage rates." (Complaint ¶ 53.) Plaintiffs contended principally that CPC in failing to pay federally recognized prevailing rates, and HPD in consenting, condoning, and authorizing that failure, deprived plaintiffs of their rights under § 5310, in violation of § 1983. As damages, plaintiffs requested, *inter alia*, the difference between the federally mandated wages and the wages they actually received.

Defendants moved pursuant to, *inter alia*, Fed. R. Civ. P. 12(b)(6) to dismiss plaintiffs' federal claims on the grounds that (1) no implied private right of action exists under § 5310, (2) the HCDA did not create a right that is enforceable under § 1983, and (3) in any event, the Complaint did not sufficiently allege that CPC acted under color of state law within the meaning of § 1983. In an opinion reported at 803 F. Supp. 710 (1992), the district court dismissed plaintiffs' claims to the extent that they were asserted directly under § 5310 but denied defendants' motions to dismiss to the extent that the claims were asserted under § 1983.

In determining that § 5310 itself did not grant plaintiffs a private right of action, the district court principally applied the analysis set out in *Cort v. Ash*, 422 U.S. 66 (1975). Noting that Congress had created other tools for the enforcement of § 5310 and that there was "no strong indication that Congress intended to create additional remedies," the court concluded that no private right of action is to be implied under § 5310. 803 F. Supp. at 731.

The court ruled, however, that § 5310 created a federal right that is enforceable under § 1983. Reading § 5310 literally and finding that its wording reflected an "unambiguous focus on construction workers," 803 F. Supp. at 723, the court concluded that there was "little doubt that

§ 5310 [wa]s intended to provide laborers with higher wages than they would receive in the absence of this section," 803 F. Supp. at 723, and that by using the command " '*shall*' " in requiring payment of wages at rates not less than the federally recognized prevailing rates, *id.* (emphasis in opinion), Congress indicated its intent to create a binding obligation, *id.* at 725. Given that the Secretary of Labor is required to establish with specificity the minimum rates to be paid laborers and mechanics, the court concluded that plaintiffs' interests were not vague, ambiguous, or amorphous:

> The contractor knows exactly what wage rates will need to be paid and . . . [what] rights are unambiguously conferred on laborers and mechanics. Finally, because the "shall" requirement of § 5310 is directed at the payment of workers' wages, rather than compelling the inclusion of a contract provision . . . the requirement is substantive, not procedural.

Id.

The court found "no evidence in the legislative history of the HCDA itself that Congress sought to foreclose a § 1983 remedy under § 5310." 803 F. Supp. at 729. It noted that the administrative scheme established for enforcement of § 5310, though sufficient to contraindicate a private right of action directly under that section, was not sufficiently comprehensive to preclude a § 1983 right of action, since there was no provision in the statute for judicial remedies and no provision in the federal regulations for an employee to initiate a proceeding for resolution of disputes. 803 F. Supp. at 727–28.

The court also concluded that the Complaint sufficiently alleged the state action necessary for a § 1983 suit

because there was a close nexus between CPC and the municipal defendants:

> Under the close nexus test and the facts presently before the Court, . . . CPC can be said to be a state actor. On the basis of the CPC/HPD Contracts and the RFPs, plaintiffs have alleged facts which, if proven true, would demonstrate that municipal defendants had "exercised coercive power or ha[d] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government." *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. at 546, 107 S. Ct. at 2986 (citations omitted). In particular, plaintiffs assert that the $90–95 cap on the Person Day Rate, which was required by municipal defendants as a condition for awarding the contract, was so low as to make it financially impossible for CPC to pay prevailing wage rates as required under 42 U.S.C. § 5310. In short, plaintiffs have alleged facts asserting that the municipal defendants ensured that any successful bidder would be forced, for economic reasons, to violate 42 U.S.C. § 5310. If proven true, these facts would be sufficient to demonstrate that the municipal defendants "exercised coercive power or . . . provided such significant encouragement" as to establish 42 U.S.C. § 1983 state action under the close nexus test.

803 F. Supp. at 720–21.

Accordingly, the district court denied defendants' motions to dismiss to the extent that the Complaint asserted claims under § 1983.

Pursuant to 28 U.S.C. § 1292(b) (1988), the court certified for interlocutory appeal so much of its order as

denied defendants' motions to dismiss the § 1983 claims, and this Court granted defendants permission to appeal from that portion of the district court's order. Thereafter, pursuant to Fed. R. Civ. P. 54(b), the district court directed that a final judgment be entered with respect to so much of its order as had granted defendants' motions to dismiss plaintiffs' claims directly under § 5310, finding that there was no just reason for delay and that the relationship between those claims and the § 1983 claims was sufficiently close to make it desirable for this Court to have the opportunity to review both rulings together. Plaintiffs' cross-appeal followed and was consolidated with defendants' appeal.

II. DISCUSSION

The HCDA, enacted in 1974, provides for federal grants to local governmental units for use in the "development of viable urban communities," in part "by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income," 42 U.S.C. § 5301(c). Section 5310, which requires that certain workers employed on construction projects funded by the HCDA be paid at least at federally recognized prevailing wage rates, provides in pertinent part as follows:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a–276a-5) . . . .

> The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 . . . .

42 U.S.C. § 5310(a). The Reorganization Plan referred to (hereinafter "1950 Plan") required federal agencies to cooperate in the enforcement of federal labor standards. Reorganization Plan No. 14 of 1950, 5 U.S.C. app. (1988).

The questions presented by these appeals are (1) whether an action for violation of § 5310 is available to plaintiffs directly under that section; (2) whether an action for violation of § 5310 is available to plaintiffs under § 1983; and (3) if such an action is available under § 1983, whether payment of subminimum wages by CPC can meet § 1983's requirement of state action. We conclude, substantially for the reasons stated by the district court, that the first question should be answered in the negative but that the second and third should be answered in the affirmative.

A. *Implied Private Right of Action Under § 5310*

Whether an implied private right of action exists under a federal statute is strictly a matter of congressional intent. "'[U]nless th[e] congressional intent [to create such a right] can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'" *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981)); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) (court's "task is limited solely to determining

whether Congress intended to create the private right of action asserted"). "The test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 509 n.9 (1990) ("*Wilder*").

When the statute itself is silent as to whether it may be enforced by private action, we normally start by examining the four factors set forth in *Cort v. Ash*, 422 U.S. 66, to wit, (1) whether the plaintiff is one of the class for whose "'*especial*'" benefit the statute was enacted, "that is, does the statute create a federal right in favor of the plaintiff"; (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; (3) whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff"; and (4) whether the cause of action is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." *Id.* at 78 (emphasis in original). All four *Cort v. Ash* factors are guides to determining congressional intent. *See Wilder*, 496 U.S. at 508 n.9; *Thompson v. Thompson*, 484 U.S. at 179; *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15-16 (1979); *Health Care Plan, Inc. v. Aetna Life Insurance Co.*, 966 F.2d 738, 740 (2d Cir. 1992). The mere fact that plaintiffs are intended beneficiaries of the statute does not mean that Congress intended the statute to grant them a private right of action to secure that benefit. *See, e.g., id.* at 741. The courts may, for example, infer that Congress did not intend to create such a right of action if it expressly provided other remedies:

> [W]here a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. . . . In such cases, "[i]n the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."

Karahalios v. National Federation of Federal Employees, Local 1263, 489 U.S. 527, 533 (1989) (quoting *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981)).

Here, though we are persuaded that plaintiffs, as workers on an HCDA-funded project, are a class for whose special benefit § 5310 was enacted (see Part II.B.1. below), neither the statute nor the legislative history gives any indication that Congress intended that section to create a private right of action. Further, though the question is close, we tend to agree with the district court that Congress incorporated a regulatory scheme that is sufficiently detailed to suggest that no private right of action was intended. Under the 1950 Plan, to which Congress referred in § 5310, the Secretary had adopted regulations with respect to Davis-Bacon and related statutes; the regulations included provisions for the predetermination of prevailing wage rates, *see* 29 C.F.R. § 1.1 *et seq.* (1974); for reconsideration or administrative review of a wage determination at the request of "[a]ny interested person," *see id.* §§ 1.8, 1.9; for investigations of complaints, *see id.* § 5.6; and for the resolution by a hearing officer of disputes of fact or law concerning proper classifications and the payment of prevailing wage rates, *see id.* § 5.11.

By its reference to the 1950 Plan in § 5310, Congress indicated that that section could be enforced through these regulatory provisions. Though there was no statement that

these would be the exclusive means of enforcement, there simply was no indication that, along with the cited regulatory mechanism, Congress also intended to authorize laborers to bring private suits. Accordingly, we conclude that § 5310 does not contain an implied private right of action.

B. *Enforceability of § 5310 Under § 1983*

The fact that a statute conferring substantive rights does not itself give its beneficiaries a private right of action to enforce it does not mean that the beneficiaries are without a private remedy. Section 1983, which provides, in pertinent part, that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured,

42 U.S.C. § 1983, may be available as a vehicle for remedying violations of federal statutes as well as constitutional violations, *see Maine v. Thiboutot*, 448 U.S. 1 (1980); *Suter v. Artist M.*, 112 S. Ct. 1360, 1366 (1992) ("*Suter*"). And unlike the inquiry into whether a substantive statute confers a direct private right of action, the § 1983 inquiry begins with a presumption in favor of the right to bring suit, for the "general rule" is that § 1983 provides a remedy for violations of federal statutory rights unless "Congress has affirmatively withdrawn the remedy," *Wilder*, 496 U.S. at 509 n.9.

Nonetheless, though the Supreme Court has "repeatedly held that the coverage of [§ 1983] must be broadly con-

strued," *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989), not every violation of a federal statute gives rise to a cause of action under § 1983. Section 1983 relief "is not available to enforce a violation of a federal statute 'where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983.'" *Suter*, 112 S. Ct. at 1366 (quoting *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 423 (1987)); *see also Wilder*, 496 U.S. at 508. As discussed below, neither circumstance exists here to prevent these plaintiffs from suing under § 1983 for the alleged violations of § 5310.

1. *Creation of an Enforceable Right*

In *Wilder*, the Supreme Court applied a three-part analysis, which is different from the *Cort v. Ash* analysis of the existence of a direct right of action, *see Wilder*, 496 U.S. at 508-09 n.9, for determining whether a federal statute creates a right that may be enforced under § 1983. The § 1983 inquiry

> turns on whether "the provision in question was intend[ed] to benefit the putative plaintiff." . . . If so, the provision creates an enforceable right unless it reflects merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the governmental unit . . . or unless the interest the plaintiff asserts is "'too vague and amorphous'" such that it is "'beyond the competence of the judiciary to enforce.'"

Wilder, 496 U.S. at 509; *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. at 106.

The *Wilder* Court considered whether health-care providers could maintain a § 1983 action to enforce a provision of the Medicaid Act that required a state, in order to receive reimbursement, to submit to the Secretary of Health and Human Services ("HHS") a medical assistance plan that set rates which the "'State finds, and makes assurances satisfactory to [HHS] are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities,'" *Wilder*, 496 U.S. at 503 (quoting 42 U.S.C. § 1396a(a)(13)(A) (Supp. V 1982)). The Court found that there was "little doubt that health care providers are the intended beneficiaries" of that provision, *Wilder*, 496 U.S. at 510; that the provision imposed a binding obligation on participating states that was "cast in mandatory rather than precatory terms," *id.* at 512; and that the obligation was not "too 'vague and amorphous,'" as "the statute and regulation set out factors which a State must consider" and provided objective benchmarks for the assessment of the reasonableness of the rates, *id.* at 519. Thus, the Court concluded that the statutory provision created a right that health-care providers could enforce in an action under § 1983.

Two years later, the Supreme Court in *Suter* distinguished *Wilder*, without mentioning its three-part test, in reaching a contrary conclusion as to a different statutory provision. The *Suter* Court considered whether children who were state wards could, under § 1983, enforce a federal statutory provision that conditioned federal reimbursement for state foster care programs on the acceptance by HHS of a state plan containing a provision that " 'reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B)

to make it possible for the child to return to his home . . . .' " 112 S. Ct. at 1364 (quoting 42 U.S.C. § 671(a)(15)). The *Suter* Court concluded that the children had no right to maintain a § 1983 action because (a) there was insufficient statutory guidance as to how "reasonable efforts" were to be measured; (b) the state's mode of compliance was, "within broad limits, left up to the State," 112 S. Ct. at 1368; and (c) since the statute provided other enforcement mechanisms, the absence of a private remedy under § 1983 did not make the "reasonable efforts" clause ineffectual, 112 S. Ct. at 1368-69. The Court reasoned that "[t]he term 'reasonable efforts' in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by [HHS]," and thus did not "unambiguously confer an enforceable right upon the Act's beneficiaries." *Id.* at 1370.

In the present case, we conclude that under either the *Wilder* analysis or, to the extent that it differs, the *Suter* analysis, § 5310 provides these plaintiffs with a right that is sufficiently clear to be enforceable under § 1983. While the ultimate goal of Congress in enacting the HCDA was, as a whole, the development of viable urban communities by providing decent housing and expanding economic opportunities for persons of low and moderate income, there can be no question that the provision for payment of a certain minimum wage confers its principal benefit on the wage earners. The persons whose wages are the subject of § 5310 are clearly specified: they are "laborers and mechanics." The statutory requirement as to their wages is not merely a hortatory "reasonable efforts" provision; nor is it merely a provision requiring inclusion of wage terms in a state plan; rather, the statute states that at least the required level of wages "shall be paid." Further, the

minimum level of those wages is neither vague nor speculative nor left for determination by the states; rather, it is determinable by reference to an unambiguous specified standard set by a federal official—the Secretary of Labor—in accordance with another federal statute—Davis-Bacon.

In sum, there can be little doubt that laborers and mechanics are the intended beneficiaries of an obligation that is cast by § 5310 in mandatory terms and that is readily quantifiable by reference to a stated benchmark as set by a federal official. There is no ambiguity. The contractor is required to pay such workers wages at rates not lower than the federally recognized prevailing rates.

2. *Congressional Foreclosure*

Notwithstanding a clearly conferred federal right, a § 1983 suit would not be available if Congress had manifested its intention to foreclose such a remedy. *Suter*, 112 S. Ct. at 1366. The courts should " ' "not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy" for the deprivation of a federally secured right.' . . . The burden is on the State to show 'by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement,' " *Wilder*, 496 U.S. at 520-21 (citations omitted). Such "other specific evidence" may include provision of a scheme of remedial devices that is sufficiently comprehensive to demonstrate congressional intent to preclude the remedy of suits under § 1983. *See, e.g., Wilder*, 496 U.S. at 521; *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) ("*Sea Clammers*"). In *Sea Clammers*, for example, the Court dealt with claims under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, and the Marine

Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 *et seq*. The statutes themselves contained "unusually elaborate enforcement provisions," 453 U.S. at 13, including, for example, provisions in the water pollution statute (a) authorizing the Environmental Protection Agency Administrator to seek civil penalties of up to $10,000 a day, as well as criminal penalties, (b) allowing "any interested person" to seek review of agency actions in federal courts, and (c) allowing citizens to sue for injunctions or for civil penalties payable to the government, 453 U.S. at 13-14 & n.25. The *Sea Clammers* Court concluded that because Congress "created so many specific statutory remedies, including the . . . citizen-suit provisions," it "intended to supplant any remedy that otherwise would be available under § 1983." 453 U.S. at 20-21. *See also Smith v. Robinson*, 468 U.S. 992, 1003 (1984) ("when a statute creates a comprehensive remedial scheme, intentional 'omissions' from that scheme should not be supplanted by the remedial apparatus of § 1983").

The statutory scheme provided by § 5310 is not so comprehensive. The HCDA itself, though it allows the Secretary of Labor to ask the Attorney General to bring a civil action against a grant recipient for noncompliance with the Act, *see* 42 U.S.C. §§ 5311(b); 5309(b)-(c), makes no reference to any other type of civil suit. As discussed in Part II.A. above, § 5310 authorizes the Secretary of Labor to cooperate with other federal agencies in enforcement and in effect adopts the regulatory scheme fashioned by the Secretary. Even that scheme, however, though providing for the determination of prevailing wage rates, the investigation of complaints, and the resolution of wage disputes, does not make provision for laborers to enforce their rights administratively. The dispute-resolution proceedings may be initiated only by the federal

agency administering the HCDA contract, the Secretary, or an HCDA contractor or subcontractor. *See* 29 C.F.R. § 5.11(a) (1992). Indeed, at the time the HCDA was enacted, the regulations apparently permitted only the contract-administering agency to initiate such proceedings. *See* 29 C.F.R. § 5.11(b) (1974). The laborers who are the beneficiaries of § 5310 were not and are not allowed to initiate administrative dispute-resolution proceedings. Nor is there any provision for a laborer to obtain judicial review of any administrative decision. In sum, we do not see in § 5310 recognition of a regulatory scheme of such comprehensiveness as to manifest an affirmative congressional intent to preclude invocation of § 1983 as a remedy.

In arguing that Congress intended to preclude use of § 1983 actions to enforce § 5310, defendants rely heavily on *Universities Research Assn. v. Coutu*, 450 U.S. 754 (1981) ("*Coutu*"), which held that there was no private right of action under Davis-Bacon for back wages where (a) the contract did not provide for Davis-Bacon wage levels, and (b) there had been an administrative predetermination that the contract did not call for Davis-Bacon work. The *Coutu* Court noted that a contractor needs to know in advance what its labor costs will be and reasoned that implication of a private right of action under Davis-Bacon to sue on a contract that had been predetermined not to call for Davis-Bacon wages would "destroy [the] careful balance" created between contractors and employees. 450 U.S. at 782.

For several reasons, this ruling does not suggest foreclosure of the § 1983 claims asserted here. First, the conclusion that a direct action may not be brought to enforce Davis-Bacon rights where it had been administratively predetermined that Davis-Bacon did not apply would not

be persuasive authority for even the proposition that no *direct* action may be brought to enforce a contract that expressly requires the payment of wages at Davis-Bacon levels. Indeed, the *Coutu* Court expressly "d[id] not decide whether the [Davis-Bacon] Act creates an implied private right of action to enforce a contract that contains specific Davis-Bacon Act stipulations." 450 U.S. at 769. Second, *Coutu*'s concern for the contractor's need to know in advance its labor costs is not an issue here, since the Contracts expressly required the payment of wages at Davis-Bacon levels. Finally, and most importantly, *Coutu* concerned only whether the action could be brought directly under Davis-Bacon, not whether it could be brought under § 1983. Though there can be no implied direct private right of action unless Congress demonstrably intended to create one, the § 1983 remedy is presumptively available unless Congress has affirmatively withdrawn it. As indicated above, we have seen no indication that Congress meant to withdraw the § 1983 remedy for violation of § 5310 where the contracts expressly call for payment of wages at rates not lower than the federally recognized prevailing rates.

In sum, we conclude that § 1983 is available as a remedy for state action that violated § 5310.

C. *State Action*

An action under § 1983 cannot, of course, be maintained unless the challenged conduct was attributable at least in part to a person acting under color of state law. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 835 (1982); *Dwares v. City of New York*, 985 F.2d 94, 98 (2d Cir. 1993). Thus, plaintiffs must plead and prove that the relationship between CPC, which paid their wages, and the municipal defendants, which established limitations

on the wages that could be paid, was sufficient to permit an inference that CPC acted not as an independent organization, but an arm of the state.

Actions by a private party are deemed state action if "there is a sufficiently close nexus between the State and the challenged action" that the actions by the private parties "may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *see Hadges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1081 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1583 (1991). The "close nexus" test is not satisfied merely by the fact that the private entity is a business " 'affected with the public interest,' " *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 353; or that the state "'approv[ed] of or acquiesce[d] in the initiatives' " of the private entity, *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 547 (1987) ("*San Francisco*") (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)); or that a business is subject to extensive regulation, *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 350, was publicly subsidized, *San Francisco*, 483 U.S. at 544, or had been given monopoly status by the state, *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 351-52. "Acts of . . . private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Rendell-Baker v. Kohn*, 457 U.S. at 841. "The purpose of [the close-nexus] requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. at 1004 (emphasis in original). Such responsibility may be found when, after the facts are sifted and weighed, it is evident that a state or its political subdivision "'has exercised

coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [state or political subdivision].'" *San Francisco*, 483 U.S. at 546 (quoting *Blum v. Yaretsky*, 457 U.S. at 1004).

The present Complaint meets the close-nexus test because the facts alleged, and supported by the Contracts relied on, easily permit the inference that CPC could not pay wages at the level required by § 5310 because of strictures imposed by the municipal defendants. The HPD RFPs provided that the contractor's overall budget was to be determined by setting a "Person-Day Rate," multiplied by the number of trainees, multiplied by the number of days worked. The Person-Day Rate was to include wages paid to the worker and all other expenses of running the program, and HPD placed a dollar ceiling on the Person-Day Rate. For the 1986–87 Contract, that ceiling was $90; for the other years, the ceiling was $95. Both ceilings were below the federally recognized prevailing wage minima for a full day's work. Thus, to win the Contracts, CPC was required to make its bids based on wages below those levels; it was paid a sum that did not give it sufficient funds to pay wages at the § 5310 required minimum levels; and it was prohibited by the Contracts from receiving any additional funding for the work performed thereunder.

In sum, the facts alleged would suffice to permit a finding that HPD effectively required CPC to pay less than the minimum wages required by § 5310, that the actions of CPC in paying those subminimum wages were the responsibility of the municipal defendants, and that CPC's conduct was therefore state action.

Defendants also contend that even if CPC's wage payments were constrained by the municipal defendants, CPC

could not be deemed a state actor because the municipal defendants themselves were engaged only in federal, not state, action, as they merely expended federal funds under the HCDA. We reject this contention for the principal reason that the "Person-Day Rate" set by the RFPs, along with the provision that the contractor could not obtain other funding to pay its workers, apparently represented an attempt by the City to limit any call upon its own treasury for the projects in question. These restrictions were not required by any federal provision. Thus, the underpayment of wages cannot be attributed to the federal government; and the municipal defendants in limiting the wages that could be paid and CPC in paying the wages as thus limited cannot legitimately claim to have been federal, rather than state, actors.

We conclude that the district court properly denied defendants' motions to dismiss plaintiffs' § 1983 claims.

CONCLUSION

The order and judgment of the district court are affirmed. Costs to plaintiffs.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT GRANTING PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b) ENTERED NOVEMBER 10, 1992
Docket Nos. 92-9236, 92-9237

KAM SHING CHAN, et. al.,

- v -

CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, and THE CHINESE-AMERICAN PLANNING COUNCIL INC.

Before: Hon. Jon O. Newman, Hon. Richard J. Cardamone and Hon. J. Daniel Mahoney, CJJ

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

ELAINE B. GOLDSMITH, Clerk
By:

Edward J. Guardaro,
Staff Attorney

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK 90 Civ. 5653 (RJW), DATED JUNE 5, 1992

KAM SHING CHAN, KAM TAI CHAN, JING YI CHEN, SHAN NON CHIU, BAK LOK CHU, KOK KUN CHU, ISRAEL GONZALEZ, SUI BIN HUANG, JIAN NING JIANG, KAM FAI KWOK, MOON SHUEN KWONG, WEI XIANG LEE, YANG I LEE, YOUNG SHI LEE, BING ZHAO LI, HAO HUI LI, KEI MAN LI, WAI TAI LI, CHI KWONG LIU, JACK YE LOUIE, SHENG HUA LU, TING GUANG MAI, CHEUK MING NG, KIN CHUNG NG, KIN HIN NG, SHUN GUO SHEN, TEN JEN SHEN, HAU WING SIN, VEIN DINH SINTRUONG, WING SHING TSE, WAI MAN WAN, KONG HTYAN WU, XU MING WU, GUO XUAN, YUE NAM ZHU,

Plaintiff,

- against -

CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, and CHINESE-AMERICAN PLANNING COUNSEL, INC.,

Defendants.

OPINION

APPEARANCES

ELLEN DICHNER
JAMES REIF
Gladstein, Reif & Meginniss
361 Broadway
New York, New York 10013

MICHAEL SHEN
Shneyer & Shen
250 West 100th Street
New York, New York 10025

Asian American Legal Defense and Education Fund
99 Hudson Street
New York, New York 10013

Attorneys for Plaintiffs

O. PETER SHERWOOD
Corporation Counsel of the
City of New York
100 Church Street
New York, New York 10007

BETH PERITZ
GOODWIN BENJAMIN
JOHN P. WOODS
Of Counsel

Attorney for Defendants City of New York and Department of Housing Preservation and Development of the City of New York

JAY S. BERKE
NICHOLAS J. PAPAS
Skadden, Arps, Slate, Meagher & Flom
919 Third Avenue
New York, New York 10022

Attorneys for Defendant Chinese-American Planning Council, Inc.

WARD, District Judge.

Chinese-American Planning Counsel,Inc. ("CPC") has moved to dismiss plaintiffs' First Amended Verified Complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim upon which relief can be granted. The City of New York ("the City") and the Department of Housing Preservation and Development of the City of New York ("HPD") (collectively "the municipal defendants") have moved to dismiss the First Amended Complaint pursuant to Rule 12(b)(1), Fed. R. Civ. P., for lack of jurisdiction over the subject matter and/or Rule

12(b)(6), Fed. R. Civ. P., for failure to state a claim which relief can be granted.[1]

By order dated July 26, 1991, the motions were referred to the Honorable James C. Francis IV, United State Magistrate Judge, to hear and report pursuant to 28 U.S.C. § 636(b)(1)(B). On January 6, 1992, Magistrate Judge Francis filed a Report and Recommendation ("the Report"), in which he recommended that the motions to dismiss be granted in their entirety. Plaintiff timely filed objections to the Report. For the reasons that follow, the Court denies defendants' motions in part, grants them in part, and modified the magistrate

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[1] At the pre-motion conference on November 30, 1990, the Court gave defendants leave to file motions to dismiss only plaintiffs' federal claims. The Court indicated that it would consider whether to permit motions to dismiss plaintiffs' state claims after deciding the instant motions.

judge's findings and recommendations in accordance with this option.[2]

BACKGROUND

Kam Shing Chan and the other plaintiffs seek to recover back wages, which they claim are due them under 42 U.S.C. § 5310 and applicable contracts, from CPC

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[2] In their submissions to the Court, the parties make several references to Charles Dickens' A Tale of Two Cities. According to a recent article, this novel was the eighth most commonly assigned book in public high schools in 1963, when it was assigned to 33% of all students. Shakespeare Then, Shakespeare Now: What They Read in High School, N.Y. Times, May 29, 1992, at B8. By 1988, however, this classic of English literature had fallen off the top ten list. Perhaps a more timely literary reference would be to Harper Lee's To Kill a Mockingbird (number four on the list in 1988, assigned to 74% of public high school students). Defendants' instant motions are undoubtedly an effort "to kill a complaint".

and the municipal defendants.[3] Plaintiffs also seek liquidated damages and attorneys' fees.

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[3] In their complaint, plaintiffs assert that they were subjected to deprivations of their rights secured by 42 U.S.C. § 5310, in violation of 42 U.S.C § 1983. First Amended Verified Complaint ¶¶ 56-61. Nowhere in the complaint do plaintiffs explicitly allege that they have an impled private right of action to enforce 42 U.S.C § 5310. Indeed, it is in their Memorandum in Opposition to Motions to Dismiss Statutory Claims, at 14-23, not in the complaint, that plaintiffs first make this legal argument with specificity. See also Memorandum of Law in Reply to Plaintiffs' Memorandum of Law in Opposition to Municipal Defendants' Motion to Dismiss the Complaint at 6-7; Defendant CPC's Reply to Plaintiffs' Memorandum in Opposition to CPC's Motion to Dismiss Count I at 1-2. Nevertheless, because courts are "required to read the complaint with great generosity on a motion to dismiss," Yoder v. Orthomolecular Nutrition Institute, Inc.,751 F.2d 555, 558 (2d Cir. 1985) (citing Conley v. Gibson, 355 U.S. 41, 47-48 (1957)), the Court finds an implied "implied private right of action" claim in the instant complaint and will therefore address that claim in its opinion. This was also the finding of the magistrate judge. Report and Recommendation at 10. Thus, each defendant has had two opportunities (once in their reply memoranda to their motions to dismiss and once in their responses to the objections to the magistrate judge's report and recommendations) to address plaintiffs' assertion that there is an implied private right of action pursuant to § 5310.

According to plaintiffs, from 1986 to 1989, CPC entered into a series of three annual contracts with HPD (the "CPC/HPD Contracts") for the "performance of construction, repair and rehabilitation work on real estate owned by the City of New York". Complaint at ¶ 44. Plaintiffs are laborers that CPC employed to perform the work required under the terms of these contracts.

The CPC/HPD Contracts were funded in whole or in part under Title I of the Housing and Community Development Act of 1974 ("HCDA"), 42 U.S.C. § 5301 et seq., which provides that "[t]he primary objective of this [title] is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." Id. § 5301(c).

42 U.S.C. § 5310, which is part of Title I of the HCDA, provides, in relevant part, that:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a -- 276a-5).... The Secretary of Labor shall have, with respect to such labor

> standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950[4] (15 F.R. 3176; 64 Stat. 1267) and section 276c of Title 40.

Because the CPC/HPD Contracts were funded under Title I of the HCDA, they were subject to, inter alia, the provisions of § 5310. This was explicitly stated in the CPC/HPD Contracts, which provided, in a section entitled "Federal Supplemental Terms and Conditions," that:

> [CPC] acknowledges that this Agreement is funded under a program providing direct financial assistance from the Federal government to the City and HPD and is subject to, and the Contractor shall comply with, the requirements of all applicable Federal Statutes, rules and regulations,

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[4] Reorganization Plan Numbered 14 of 1950 ("the Reorganization Plan") authorized the Secretary of Labor to make reasonable regulations to ensure compliance with the Davis-Bacon Act and related statutes, such as the HCDA. The regulatory regime established under the Reorganization Plan allows contractors and laborers to challenge the setting and application of Davis-Bacon wage standards and provides for contractors to be debarred for up to three years from eligibility for applicable contracts as a deterrent to the willful violation of labor standards in federal contracting. Significantly, the Reorganization Plan does not provide for an action by laborers for back wages claimed under the Davis-Bacon standards.

> including, but not limited to, those set forth in Exhibit F attached to this agreement.

Included among the "applicable Federal Statutes" in Exhibit F were Title I of the HCDA, as well as the Davis-Bacon Act.

Plaintiffs assert that they were not paid prevailing wage rates, as determined by the Secretary of Labor. In their Memorandum in Opposition to Motions to Dismiss Statutory Claims, plaintiffs state that municipal defendants issued a Request for Proposals ("RFP") and ultimately signed a contract with CPC which provided that the Person Day Rate applicable to the HCDA work could not exceed $90 per diem.[5] Plaintiffs argue that, once CPC's other expenses were deducted the $90 cap on the Person Day Rate "ensured that each [laborer] would be paid far below the prevailing wage rate." Id. at 4.

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[5] The Person Day Rate increased to $95 per day for the second and third round RFPs and contracts.

DISCUSSION

Defendants' motions present this Court with two distinct, yet related, areas of inquiry. First, the Court must determine whether 42 U.S.C. § 5310 creates a right of action under 42 U.S.C. § 1983. This inquiry turns on: (a) whether defendants were acting under color of state law; (b) whether 42 U.S.C. § 5310 creates an enforceable "right, privilege or immunity," as required under 42 U.S.C. § 1983; and (c) whether Congress intended to foreclose a 42 U.S.C. § 1983 right of action under 42 U.S.C. § 5310. Second, the Court must ascertain whether plaintiffs have an implied private right of action 42 U.S.C. § 5310.

Part (a) of the first inquiry requires a fact-specific analysis. Parts (b) and (c) of the first inquiry, as well as the second inquiry, present questions of statutory interpretation which are issues of first impression for the federal courts.

After discussing the standards to be applied when reviewing a magistrate judge's report and recommendations and deciding a Rule 12(b)(1) or 12(b)(6) motion to dismiss, the Court will turn to these substantive issues.

A. Standards for Reviewing a Magistrate Judge's Report and Recommendations

To accept the Report and Recommendations of a magistrate judge to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record. See Rule 72, Fed. R. Civ. P., Notes of Advisory Committee on Rules (citing Campbell v. United States Dist. Court, 501 F.2d 196, 206 (9th Cir.), cert. denied 419 U.S. 879 (1974)). 28 U.S.C. § 636(b)(1) affords the district court broad latitude in considering a magistrate judge's recommendation, even if no party objects to it. Grassia v. Scully, 892 F.2d 16, 19 (2d Cir. 1989). When timely objection has been made to a portion or portions of a magistrate judge's report, however, the district judge must "make a de novo determination . . . of any portion of the magistrate's disposition to which specific written objection has been made." Rule 72(b), Fed. R. Civ. P. See also, 28 U.S.C. § 636(b) (1). The judge may then accept, reject, or modify, in whole or in part, the magistrate judge's proposed findings and recommendations. 28 U.S.C. § 636 (b) (1).

A district court's obligation to make a de novo determination of properly contested portions of a magistrate judge's report does not require that the judge conduct a de novo hearing on the matter. United States v. Radatz, 447 U.S. 667, 676 (1980). It is sufficient that the district court "arrive at its own, independent conclusion about those portions of the [magistrate judge's] [report to which objection is made." Hernandez, v. Estelle, 711 F.2d 619, 620 (5th Cir. 1983). To this end, the court must

"exercise ... sound judicial discretion with respect to whether reliance should be placed on [the magistrate judge's] findings." American Express Int'l Banking Corp. v. Sabet, 512 F. Supp. 472, 473 (S.D.N.Y. 1981), aff'd without opinion, 697 F.2d 287 (2d Cir.), cert. denied, 459 U.S. 858 (1982).

B. Standards for Dismissal Pursuant to Rules 12(b)(1) and 12(b)(6)

1. Rule 12(b)(1)

Municipal defendants have moved to dismiss the First Amended verified Complaint pursuant to Rule 12(b)(1), Fed. R. Civ. P., for lack of jurisdiction over the subject matter. When such a defense is asserted, " 'the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined.' " Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n, 896 F.2d 674, 678 (2d Cir. 1990) (quoting 5 C. Wright and A. Miller, Federal Practice and Procedure, § 1350, p. 548 (1969)).

Plaintiffs claim subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337. Section 1331, which confers jurisdiction when there is a federal question, provides that, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." Inasmuch as this action arises under 42 U.S.C. § 1983, as well as under 42

U.S.C. § 5310, there is the requisite subject matter jurisdiction pursuant to 28 U.S.C. § 1331.[6]

In accordance with this analysis, the portion of municipal defendants' motion made pursuant to Rule 12(b)(1) is denied.

2. **Rule 12(b)(6)**

In considering a motion to dismiss for failure to state a claim upon which relief may be granted, a court is required to accept the facts alleged in the complaint as true. Frasier v. General Electric Co., 930 F.2d 1004, 1007 (2d Cir. 1991) (citing Cooper v. Pate, 378 U.S. 546 (1964)). The complaint includes any written instrument attached to it as an exhibit and any statements or documents incorporated into it by reference. Cortec Industries, Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991), cert. denied, 112 S. Ct. 1561 (1992); Goldman v. Belden, 754 F.2d 1059, 1065-66 (2d Cir. 1985).

In the instant case, the CPC/HPD Contracts and the RFPs were neither attached to the complaint nor incorporated into it by reference. It is undisputed by the parties, however, that these documents are properly before the Court on this motion to dismiss, because plaintiffs clearly had notice of these documents and relied upon them in framing the complaint. See Cortec Industries, Inc. v.

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[6] Because this Court finds subject matter jurisdiction pursuant to 28 U.S.C. § 1331, it is unnecessary to decide whether jurisdiction exists pursuant to 28 U.S.C. § 1337.

Sum Holding L.P., 949 F.2d at 48; Memorandum of Law in Support of Municipal Defendants' Motion to Dismiss the Complaint at 4n.2; Plaintiffs' Memorandum in Opposition to Motions to Dismiss Statutory Claims at 3 n.1.

The court must read the complaint generously, and draw all reasonable inferences in favor of plaintiffs. Pross v. Katz, 784 F.2d 455, 457 (2d Cir. 1986). The complaint may be dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Branum v. Clark, 927 F.2d 698, 705 (2d Cir 1991). Thus, "[the function of a [Rule 12(b)(6)] motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc., 748 F.2d 774, 779 (2d Cir. 1984) (quoting Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)). The Court now turns to the legal feasibility of the plaintiffs' federal claims.

C. Plaintiffs' § 1983 Claim

The Court must determine whether 42 U.S.C. § 5310 provides plaintiffs with a cause of action pursuant to 42 U.S.C. § 1983, which provides, in relevant part,

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States

> or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any other proper proceeding for redress.

(emphasis added)

In their motions to dismiss, defendants assert that plaintiffs cannot satisfy either the "state action" or the "rights, privileges or immunities" requirement. Further, defendants assert that there is no § 1983 right of action, because Congress intended to foreclose such a right of action under § 5310. The Court now turns to these arguments.

1. Were Defendants Acting Under Color of State Law?

To state a claim against a private actor under § 1983, the complaint must allege facts demonstrating that the private entity acted in concert with the state actor to commit an unconstitutional or unlawful act. Spear v. Town of West Hartford, 954 F.2d 63, 68 (2d Cir. 1992), petition for cert. filed, May 20, 1992. Defendants assert that plaintiffs' complaint fails to allege facts which would establish that CPC's alleged failure to pay prevailing wages was under color of state law. Plaintiffs bear the burden of proving that the acts of private entities constitute state action for purposes of § 1983. Flagg Brothers, Inc. v. Brooks,

436 U.S. 149, 155 (1978); Hadges v. Yonkers Racing Corp., 918 F.2d 1079, 1082 n.3 (2d Cir. 1990), cert. denied, 11 S.Ct. 1583 (1991).

The Second Circuit has recently addressed the issue of when private conduct qualified as state action for § 1983 purposes. In Hadges, the court was asked to decide whether the Yonkers Racing Corporation ("YRC"), as the private owner of a racetrack licensed by the State of New York to conduct parimutuel wagering on harness races, engaged in § 1983 state action when it denied Hadges' application to work at YRC's racetrack. Hadges contended that YRC's denial of his application amounted to § 1983 state action because YRC was subject to pervasive New York State statutory and regulatory control, and because it generated significant tax revenues for the State, received State tax credits, and held a monopoly over harness racing in the New York metropolitan area. Id. at 1080-81.

The Court identified two independent tests for determining whether there is a state action: the symbiotic relationship test and the close nexus test. Either test is sufficient to establish § 1983 state action.

a. The Symbiotic Relationship Test

Private action is transformed into state action under this test when " '[t]he State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity.' " Hadges v. Yonkers Racing Corp.,

918 F.2d at 1081 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715 725 (1961)).

In Burton, where this test was first articulated by the Supreme Court, the owner of a private restaurant that leased space in a state-owned building refused to serve an African-American. The Court found that the restauranteur's action qualified as § 1983 state action because the state owned the building, as well as an adjacent parking lot, and thus had a direct financial interest in the restaurant's success. In addition, the state had dedicated the building for public purposes, thereby conferring tax exempt status on the building. Hadges v. Yonkers Racing Corp., 918 F.2d at 1082 (citing Burton v. Wilmington Parking Auth., 365 U.S. at 723-24).

While courts are to search for "nonobvious involvement of the State in private conduct," Burton v. Wilmington Parking Auth., 365 U.S. at 722, the Second Circuit in Hadges did not find the nature or extent of state involvement that was present in Burton. In contrast to Burton, the State in Hadges did not have a proprietary interest in Yonkers Raceway, which was purchased and maintained by private, not public dollars. Furtheremore, the State in Hadges did not own a neighboring, interlinked business, and consequently lacked the direct financial stake in YRC's success that was present in Burton. While YRC received tax credits from the State, YRC did not enjoy the State's tax-exempt status. Finally, the Hadges court noted that the State did receive greater revenues if YRC prospered, but the court held that if such a link were sufficient to forge a symbiotic relationship between YRC and the State, then the actions of every successful

corporation within the State would qualify as state action. Hadges v. Yonkers Racing Corp., 918 F.2d at 1082.

In sum, the symbiotic relationship test seeks to establish whether the overall interests of the government and the private actor overlap to such an extent as to virtually coincide.

b. The Close Nexus Test

Whereas the symbiotic relationship test focuses on the state's overall relationship with the private actor, the close nexus test specifically examines the state's link to the challenged action. Hadges v. Yonkers Racing Corp., 918 F.2d at 1082. Under this test, private action is transformed into state action when " 'there is a sufficiently close nexus between the State and the challenged action' that the private party's action 'may be fairly treated as that of the State itself.' " Id. at 1081 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

The "close nexus" standard is a difficult one to attain. For example, the mere fact that a business is subject to state regulation does not by itself convert its action into that of the state. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 544 (1987). Nor does the fact that the regulation is extensive and detailed, as in the case of most privately-owned utilities, create state action. Jackson v. Metropolitan Edison Co., 419 U.S. at 350. Furthermore, even when an entity benefits from state-conferred monopoly status, this is not sufficient state action for § 1983. Id. at 351-52.

Indeed, the government may subsidize private entities without assuming constitutional responsibility for their actions. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. at 544 (citing Blum v. Yaretsky, 457 U.S. 991, 1011 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982). "The fact 'that a private entity performs a function which serves the public does not make its acts governmental action.'" San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. at 544 (quoting Rendell-Baker v. Kohn, 457 U.S. at 842). Of relevance to the instant case, private entities who contract with the government are not necessarily government actors. Rendell-Baker v. Kohn, 457 U.S. at 840-41 (a "school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.") Furthermore, "'mere approval of or acquiescence in the initiatives' of [a private actor] . . . is not enough to make the [private actor's] actions those of the Government." San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. at 547 (quoting Blum v. Yaretsky, 457 U.S. at 1004-05).

Thus the close nexus test establishes a relatively small range of government action for purposes of § 1983: "a government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be

deemed to be that of the government'". San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. at 546 (quoting Blum v. Yaretsky, 457 U.S. at 1004; Rendell-Baker v. Kohn, 457 U.S. at 840) (citing Flagg Brothers, Inc. v. Brooks, 436 U.S. at 160; Jackson v. Metropolitan Edison Co., 419 U.S. at 357; Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970))(emphasis added).

Upon application of the close nexus test, the Hadges court found no state action, holding that "there is no evidence that a State official participated in YRC's decision to deny Hadge's application."[7] Hadges v. Yonkers Racing Corp., 918 F.2d at 1083.

c. The Symbiotic Relationship Test and Close Nexus Test as Applied to the RFPs and CPC/HPD Contracts

In determining whether either of these tests results in a finding of § 1983 state action, this Court must

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[7] However, the Hadges court did cite to Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589, 599 (3d Cir. 1979), cert. denied, 446 U.S. 956 (1980), where the Third Circuit held that if a State official "personally and actively participated" in a racetrack's decision to expel a driver, state action existed. Thus the Hadges court acknowledged that there are circumstances where the close nexus test does create § 1983 state action. Hadges v. Yonkers Racing Corp., 918 F.2d at 1083.

ultimately undertake a detailed factual inquiry. "Neither of these tests lends itself to formulaic applications. Instead, both of these inquires requires us to sift through and weigh the facts to determine whether the alleged ties between the State and the private actor are sufficiently strong to attribute the private actor's conduct to the state." Hadges v. Yonkers Racing Corp., 918 F.2d at 1081 (citing Burton v. Wilmington Parking Auth., 365 U.S. at 722. See also Jackson v. Metropolitan Edison Co., 419 U.S. at 351 ("The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met." (citing Burton v. Wilmington Parking Auth., 365 U.S. 715)). For purposes of the instant motions to dismiss, in accordance with Rule 12(b)(6) standards, the Court will accept the facts alleged in the complaint as true and will consider the CPC/HPD Contracts and the RFPs.

CPC was not a state actor under the symbiotic relationship test. Neither municipal defendant had the sort of interdependent economic interest that is required under the Burton test. Municipal defendants did not share a proprietary interest with CPC in the work being done. Nor did the municipal defendants have an "interlinked" business, as was the case with the State's parking lot in Burton. For these reasons, the symbiotic relationship test does not establish § 1983 state action in the instant case.

Under the close nexus test and the facts presently before the Court, however, CPC can be said to be a state actor. On the basis of the CPC/HPD Contracts and the RFPs, plaintiffs have alleged facts which, if proven true,

would demonstrate that municipal defendants had "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government." San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. at 546 (citations omitted). In particular, plaintiffs assert that the $90-95 cap on the Person Day Rate, which was required by municipal defendants as a condition for awarding the contract, was so low as to make it financially impossible for CPC to pay prevailing wage rates as required under 42 U.S.C. § 5310. In short, plaintiffs have alleged facts asserting that the municipal defendants ensured that any successful bidder would be forced, for economic reasons, to violate 42 U.S.C. § 5310. If proven true, these facts would be sufficient to demonstrate that the municipal defendants "exercised coercive power or . . . provided such significant encouragement" as to establish 42 U.S.C. § 1983 state action under the close nexus test.[8]

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[8] Municipal defendants have argued that, because part of CPC's contractual mandate was to provide off-site "life skills" training to plaintiffs, and thus plaintiffs were not laboring on-site for CPC on a full-time basis, the $90-95 Person Day Rate was sufficient to allow CPC to pay the prevailing minimum wage during those hours of the week when plaintiffs were actually providing labor services. See Memorandum of Law in Reply to Plaintiffs' Memorandum of Law in Opposition to Municipal Defendants' Motion to Dismiss the Complaint at 26. This assertion, while relevant to the ultimate adjudication of this action, concerns a factual argument raised by defendants that is not properly before

(continued...)

Finally, municipal defendants argue that plaintiffs have failed to adequately plead the existence of a municipal custom, practice or policy which caused plaintiffs' injuries. However plaintiffs did allege that HPD's conduct "was pursuant to official custom, policy and usage." Amended Complaint at ¶ 55. Moreover, it strains credulity to assert, as municipal defendants have, that a series of contracts, worth millions of dollars in the aggregate, and signed by the Commissioner of HPD, do not reflect official policy or usage.[9]

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[8] (...continued)
the Court on a Rule 12(b)(6) motion to dismiss.

[9] Because the Court has found state action under the close nexus test, it is unnecessary to address plaintiffs' conspiracy claim, First Amended Verified Complaint at ¶ 53, at the present time.

2. Does 42 U.S.C. § 5310 Create a "Right, Privilege or Immunity," as Required Under 42 U.S.C.§ 1983?

a. The Existing Framework

The jurisprudence concerning whether a given statute created a right, privilege or immunity enforceable under § 1983 is in a state of flux. In Wilder v. Virginia Hospital Ass'n, 110 S.Ct. 2510 (1990), the Supreme Court applied a well-established, three-part test in finding that the Boren Amendment to the Medicaid Act created such a right. However in Suter v. Artist M., 112 S.Ct. 1360 (1992), decided approximately two months ago, the Supreme Court chose not to explicitly apply the Wilder framework when determining whether such a right exists, although it did not explicitly overrule Wilder and provided no alternative analytic framework. Because the Wilder framework was not explicitly overruled,[10] this Court will apply the Wilder

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[10] Justice Blackmun, in a stinging dissent, indicates that the Suter majority is dramatically altering, if not overruling, Wilder:

> the court has failed, without explanation, to apply the framework our precedents have consistently deemed applicable; it has sought to support its conclusion by resurrecting arguments decisively rejected less than two years ago in Wilder; and it has contravened 22 years of precedent by suggesting that the

(continued...)

framework, with the modifications suggested by Suter, in *ascertaining whether 42 U.S.U. § 5310 created a right* enforceable under § 1983.[11]

Section 1983 provides a cause of action for violations of federal statutes as well as the Constitution. Maine v. Thiboutot, 448 U.S. 1, 4 (1980); Wilder v. Virginia Hospital Ass'n, 110 S.Ct. at 2517. There is no cause of action, however, when " 'the statute does not create enforceable rights, privileges, or immunities within the meaning of § 1983 ' " Id. (quoting Wright v. Roanoke

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[10] (...continued)

> existence of other "enforcement mechanisms" precludes § 1983 enforcement. At least for this case, it has changed the rules of the game without offering even minimal justification, and it has failed even to acknowledge that it is doing anything more extraordinary than "interpreting" the [relevant act] "by its own terms." Readers of the Court's opinion will not be mislead by this hollow assurance.

Suter v. Artist M., 112 S.Ct. at 1377.

[11] In the approximately two months since Suter was decided, no federal court has addressed the issue of whether the Wilder framework is still good law.

Redevelopment and Housing Auth., 479 U.S. 418, 423 (1987)).

Under this exception, a mere violation of federal law is not sufficient to trigger § 1983. Rather plaintiff must demonstrate that he or she was deprived of a right, privilege, or immunity. Wilder v. Virginia Hospital Ass'n, 110 S.Ct. at 2517; Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989)). In determining whether such a right, privilege or immunity exists, the Court must ascertain (1) whether " 'The {statutory} provision in question was intended to benefit the putative plaintiff' " Wilder v. Virginia Hospital Ass'n, 110 S.Ct. at 2517 (quoting Golden State Transit Corp. v. City of Los Angeles, 493 U.S. at 106). If so, the provision creates an enforceable right unless (2) "it reflects merely a 'congressional preference' for a certain kind of conduct rather than a binding obligation on the governmental unit," Wilder v. Virginia Hospital Ass'n 110 S.Ct. at 2517 (citing Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 19 (1981)), or unless (3) the asserted interest is " 'too vague and amorphous' such that it is 'beyond the competence of the judiciary to enforce.' " Wilder v. Virginia Hospital Ass'n, 110 S.Ct. at 2517 (quoting Golden State Transit Corp. v. City of Los Angeles, 493 U.S. at 108; Wright v. Roanoke Redevelopment and Housing Auth., 479 U.S. at 431-32).

Applying this test in Wilder, the Supreme Court found that the Boren Amendment to the Medicaid Act created a right enforceable by the health care providers under § 1983. First, the Court found that "[t]here can be

little doubt that health care providers are the intended beneficiaries of the Boren Amendment. The provision ... is phrased in terms of benefitting health care providers." Wilder v. Virginia Hospital Ass'n, 110 S.Ct. at 2517-18. Second, the Wilder court found that the Boren Amendment was "cast in mandatory rather than precatory terms: the state plan 'must' 'provide for payment of hospitals.'" Wilder v. Virginia Hospital Ass'n, 110 S.St. at 2519. "'The Boren Amendment's language succinctly sets forth a congressional command, which is wholly uncharacteristic of a mere suggestion or 'nudge'.'" Wilder v. Virginia Hospital Ass'n 110 S.Ct. 2519 (quoting West Virginia University Hospitals, Inc. v. Casey, 885 F.2d 11, 20 (3d Cir., 1989).

The Suter court did not explicitly apply the three-part "right" test of Wilder and its precursors. Although the Court did not provide an analytic framework for deciding § 1983 right of action cases, it did establish certain guidelines to be followed in determining whether there is a § 1983 of action.

In Suter, the Court held that there is no private right of action to enforce the Adoption Assistance and Child Welfare Act of 1980 (the "AACWA"), either implicitly, under the AACWA itself, or through a § 1983 action. The Suter court distinguished the AACWA from the statute in Wilder, writing that, "in [Wilder], we held that the Boren Amendment actually required the States to adopt reasonable and adequate rates, and that this obligation was enforceable by the providers. We relied in part on the fact that the statute and regulations set forth in some detail the

factors to be considered in determining the methods for calculating rates." Suter v. Artist M., 112 S.Ct. at 1368. The Suter Court concluded that, in providing that the State exercise "reasonable efforts" in maintaining a abused or neglected child in his home or return the child to his foster care, the AACWA left the question of how to define "reasonable efforts" up to the State. Id. Thus, the Court reasoned, the AACWA did not create an enforceable right.

In addition, the Suter court wrote that, "[c]areful examination of the language [requiring 'reasonable efforts'], in the context of the entire [AACWA], leads us to conclude that the 'reasonable efforts' language does not unambiguously confer an enforceable right upon the [AACWA's] beneficiaries. The term 'reasonable efforts' in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary." Id. at 1370 (emphasis added). Thus, under Suter, any right must be unambiguously conferred.

Finally, the Court noted that the regulations promulgated by the Secretary of Health and Human Service to enforce the AACWA

> do not evidence a view that [the AACWA] places any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary.... What is significant is that the [AACWA] regulations are not specific, and do not provide notice to the States that failure

> to do anything other than submit a plan with the requisite features, to be approved by the Secretary, is a further condition on the receipt of funds from the Federal Government.

Id. at 1369. Thus the Court found that the burdens placed on the State under the AACWA were procedural, not substantive.

While the Suter court's approach to analyzing the AACWA is ad hoc, there are several guidelines at work. First, the right allegedly created by Congress must be specific and unambiguous. The statutory requirement that the State exercise "reasonable efforts," the Court ruled, was too general and ambiguous to establish a right. Finally, the Court found that the AACWA requirements were merely procedural, not substantive.

b. The Existing Framework as Applied to 42 U.S.C. § 5310

Under the Wilder framework, the first question to be asked is whether the statutory provision was intended to benefit plaintiffs. There can be little doubt that § 5310 is intended to provide laborers with higher wages than they would receive in the absence of this section. The congressional word choice in § 5310, particularly when viewed in contrast to other statutory provisions concerning prevailing wage requirements, reflects an unambiguous focus on construction workers: "[a]ll laborers and mechanics employed by contractors or subcontractors in the

performance of construction work financed ... with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality" (emphasis added). This can be contrasted with a provision in Title II of the HCDA, amending the United States Housing Act of 1937, which provided that,

> [a]ny contract ... pursuant to this chapter shall contain a provision requiring that ... not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act, shall be provided to all laborers and mechanics employed in the development of the project involved.

42 U.S.C. § 1437j (emphasis added). The § 1437j language, with its emphasis on the contract, can properly be viewed as creating a duty on the contractor, rather than creating a right for the laborers/mechanics.

The contrast between § 1437j and § 5310 is significant. In drafting § 5310, if Congress had wished to focus on the contract itself, rather than establish a right for workers, it certainly knew how to do so. Thus the wording of § 1437j is strong evidence that Congress intended to create a right for laborers and mechanics under § 5310.

Alternatively, Congress could have focused on the government's responsibility, as it did in 33 U.S.C. § 1372, which provides:

> The Administrator [of the Environmental Protection Agency] shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on treatment works for which grants are made under this chapter shall be paid wages at rates not less than those prevailing for the same type of work on similar construction in the immediate locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act.

On the basis of this language, the Fifth Circuit, in United States ex rel. Glynn v. Capeletti Bros., Inc., 621 F.2d 1309 (5th Cir. 1980), concluded that Congress did not intend to confer benefits directly on laborers, but rather to impose a duty on a federal agency to insure that certain wages were paid. It is significant that § 1372 was enacted prior to the HCDA, in 1972, because this is further evidence that Congress knew how to place a burden on a federal agency, rather than confer a right on laborers/mechanics, when it chose to do so.

It is also instructive to compare the language of § 5310 to the language used in the Davis-Bacon Act itself, which, like 42 U.S.C. § 1437j, has contracts, not laborers, as its focus. That statute provides that:

> [t]he advertised specifications for every contract in excess of $2,000 to which the United States ... is a party, for construction, alteration and/or repair ... of public buildings

> or public works of the United States ... which requires or involves the employment of mechanic and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing [wages].

40 U.S.C. § 276a(a).

In Universities Research Assn. v. Coutu, 450 U.S. 754 (1981), the Supreme Court sought to determine whether this Davis-Bacon Act provision created a right in the mechanics and laborers:

> [s]ection 1 of the Davis-Bacon Act requires that certain stipulations be placed in federal construction contracts for the benefit of mechanics and laborers, but it does not confer rights directly on those individuals. Since § 1 is simply 'phrased as a directive to federal agencies engaged in the disbursement of funds,' its language provides no support for the implication of a private remedy.

Id. at 772-73 (emphasis added) (citing Cannon v. University of Chicago, 441 U.S. 677, 693 n. 14 (1979)).[12]

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[12] Although the Coutu court's inquiry concerned the alleged existence of an implied private right of action, rather (continued...)

Defendants point to Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Dev., 799 F.2d 774, 793-95 (1st Cir. 1986) to argue that the language of § 5310, when viewed in the context of the primary congressional purpose in passing Title I of the HCDA, does not create a right in laborers and mechanics. In Latinos Unidos, the First Circuit found that 42 U.S.C. § 5309, which prohibits discrimination on the basis of race, color, national origin, or sex in connection with programs or activities funded under Title I of the HCDA, did not create an implied private right of action. The First Circuit reasoned that the purpose of the HCDA was not the prevention of discrimination, noting that Title I of the HCDA "was passed in response to Congress' concern for the 'critical social, economic and environmental' conditions existing in the nation's cities. The statute's primary objective was 'the development of viable urban communities.'" Id. at 793 (quoting 42 U.S.C. §§ 5301(a) & (c)). Thus the Latins Unidos court found that, because Title I was not enacted for the "especial benefit" of the minority community, 42 U.S.C. § 5309 did not create a private right of action for discrimination.

When interpreting § 5310, this Court will apply the general principle that "a statute should be read according to its literal terms, unless this produces an interpretation which makes little sense, does violence to the

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[12] (...continued)
than a § 1983 right of action, the analysis as to whether there is a right created by a statutory provision is the same for each inquiry.

purposes Congress sought to serve by the statute, or is otherwise 'demonstrably at odds with the intentions of the statutes drafters.'" Metropolitan Transp. Auth. v. F.E.R.C., 796 F.2d 584, 591 (2d Cir. 1986) (citations omitted), cert. denied, 479 U.S. 1085 (1987).

With this principle in mind, this Court concludes that finding a right for laborers and mechanics under § 5310 is entirely consistent with the overall congressional purpose in enacting Title I of the HCDA. Congress stated that "[t]he primary objective of [Title I of the HCDA] is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c) (emphasis added). Thus, the instant case is distinguishable from Latinos. There can be little doubt that, if CPC had paid the prevailing wage, rather than the substantially lower wage actually paid to plaintiffs, this would have provided expanded economic opportunities for persons of low or moderate income, namely plaintiffs.[13]

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[13] Economists and other public policy makers debate the value to those of low and moderate incomes of having a wage floor, either in the form of a federal minimum wage or a prevailing wage. While a wage floor increases the welfare of those who are hired, it is arguable that, if there were no prevailing wage requirement, social utility would be increased because contractors would be able to hire more workers on a fixed labor budget. It is, however, not the function of the courts to resolve this policy debate. It is

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The Court must next ask whether § 5310 contains merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the governmental unit. The language of § 5310 indicates that Congress sought to create a binding obligation on the governmental unit. In particular, § 5310 provides that employees on construction projects financed under Title I of the HCDA "shall" be paid at least prevailing wages, as determined by the Secretary of Labor. As discussed above, had Congress wished to create a procedural requirement that contracts contain certain terms, rather than a binding obligation toward laborers and mechanics, they could have done so, using language such as was in 42 U.S.C. § 1437j.

Furthermore, in applying the third part of the Wilder test, the interest that the plaintiffs assert is not "too vague and amorphous such that it is beyond the competence of the judiciary to enforce." Pursuant to § 5310, the Secretary of Labor is required to establish, with great

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[13] (...continued)
enough for the Court to find that Congress could have believed that a prevailing wage provision would serve the purpose of "expanding economic opportunities, principally for persons of low and moderate income." Although there is nothing in the statute itself or its legislative history which explicitly establishes that Congress had this causal link in mind when it enacted Title I of the HCDA, the fact that Congress included § 5310 in this title is sufficient to establish that Congress thought § 5310 would, at a minimum, not be inconsistent with the purposes of Title I.

specificity, prevailing wage rates to be paid laborers and mechanics.

Under the Suter court's guidelines, § 5310 also creates a § 1983 right of action. First, unlike the "reasonable efforts" clause to the AACWA, the right to prevailing wages under § 5310 (as determined by the Secretary of Labor) creates an unambiguous, specific benchmark. The contractor knows exactly what wage rates will need to be paid and, as discussed supra, rights are unambiguously conferred on laborers and mechanics. Finally, because the "shall" requirement of § 5310 is directed at the payment of workers' wages, rather than compelling the inclusion of a contract provision (as in 42 U.S.C. § 1437j), the requirement is substantive, not procedural. For these reasons, this Court finds that 42 U.S.C. § 5310 unambiguously conferred a specific substantive right on plaintiffs under the Suter standards.

3. Did Congress Foreclose § 1983 Enforcement of § 5310?

a. The Existing Framework

The general rule that a violation of federal law creates a § 1983 right of action has a second exception: when Congress has foreclosed § 1983 enforcement of a given statute in that statute itself. However, a court should not " 'lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right.' " Wilder v. Virginia Hosp. Ass'n, 110 S.Ct. at 2523 (quoting Wright v. Roanoke

Redevelopment & Housing Auth., 479 U.S. at 423-24 (quoting Smith v. Robinson, 468 U.S. 992, 1012 (1984)).

Thus, there is a heavy burden on a defendant to demonstrate that Congress intended to foreclose a § 1983 remedy. As the Wilder court wrote, in rejecting the government's argument that Congress foreclosed enforcement of the Medicaid Act under § 1983:

> [t]he burden is on the State to show "by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." Wright, 479 U.S. at 423.... In the absence of such an express provision, we have found private enforcement foreclosed only when the statute itself creates a remedial scheme that is "sufficiently comprehensive ... to demonstrate congressional intent to preclude the remedy of suits under § 1983." Middlesex County Sewerage Auth. v. National Sea Clammers Assn., 453 U.S. 1, 20 (1981).

Wilder v. Virginia Hospital Assn., 110 S.Ct. at 2523. Furthermore, "[t]he availability of administrative mechanisms to protect plaintiff's interests is not necessarily sufficient to demonstrate that Congress intended to foreclose a § 1983 remedy. Rather the statutory framework must be such that 'allowing a plaintiff' to bring a § 1983 action 'would be inconsistent with Congress' carefully tailored

scheme.'" Golden State Transit Corp. v. City of Los Angeles, 493 U.S. at 106-07 (citations omitted).

The "sufficiently comprehensive" test is rarely met. As the Wilder court noted,

> [o]n only two occasions have we found a remedial scheme established by Congress sufficient to displace the remedy provided in § 1983. In Sea Clammers, we held that the comprehensive enforcement scheme found in the Federal Water Pollution Control Act -- which granted the Environmental Protection Agency considerable enforcement power through the use of noncompliance orders, civil suits and criminal penalties, and which included two citizen suit provisions -- evidenced a congressional intent to foreclose reliance on § 1983.... Similarly, in Smith v. Robinson, we held that the elaborate administrative scheme set forth in the Education of the Handicapped Act manifested Congress' desire to foreclosure private reliance on § 1983 as a remedy. The EHA contained a 'carefully tailored administrative and judicial mechanism' that included local administrative review and culminated in a right to judicial review.

Wilder v. Virginia Hospital Assn., 110 S.Ct. 2523-24 (citations omitted).

The Wilder court concluded that the administrative scheme established pursuant to the Boren Amendment to the Medicaid Act could not be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983, noting that, "[i]n Wright, we concluded that the 'generalized powers' of HUD to audit and cut off federal funds were insufficient to foreclose reliance on § 1983 to vindicate federal rights. We noted that HUD did not exercise its auditing power frequently and the statute did not require, nor did HUD provide, any mechanism for individuals to bring problems to the attention of HUD." Wilder v. Virginia Hospital Assn., 110 S.Ct. at 2523.

This Court must now determine whether the administrative enforcement scheme of § 5310 is "sufficiently comprehensive", such that allowing a § 1983 action would be inconsistent with Congress' carefully tailored enforcement scheme.[14]

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[14] In dicta, the Suter court determined that other sections of the AACWA provide enforcement mechanisms for the "reasonable efforts" clause of the Act, and suggested that even a non-comprehensive statutory enforcement scheme might preclude a § 1983 right of action: "[w]hile the [AACWA's] statutory provisions may not provide a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose remedies under § 1983, they do show that the absence of a remedy to private plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter." Suter v. Artist M., 112 S.Ct. at 1368-69. See (continued...)

b. **The Existing Framework as Applied to 42 U.S.C. § 5310**

Nowhere is the HCDA did Congress explicitly foreclose § 1983 enforcement of § 5310. The Court will therefore seek to determine whether Congress implicitly foreclosed § 1983 enforcement of § 5310.

As an initial matter, it is helpful to view § 5310 as establishing two mechanisms in the context of Title I of the HCDA: (1) the predetermination of a prevailing wage and (2) the enforcement of a contractor's obligation to pay that wage. While it may be that allowing a § 1983 right of action to challenge the Secretary's predetermination of a prevailing wage rate would upset

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[14] (...continued)
also, id. at 1377 (Blackmun, J., dissenting) ("[the Court] has contravened 22 years of precedent by suggesting that the existence of other 'enforcement mechanisms' precludes § 1983 enforcement"). However, because the Suter court found that the AACWA did not create an enforceable right, the Court did not reach the issue of whether a statutory enforcement scheme that could be characterized as non-comprehensive would preclude a right of action under § 1983. Id at 1368 n.11. Therefore this Court will continue to follow the precedent of Wilder and its predecessors in finding that only a "comprehensive" statutory scheme will preclude a § 1983 right of action.

Congress' carefully tailored scheme in enacting § 5310,[15] the same cannot be said of a § 1983 right of action seeking to enforce a contractor's obligation to pay the predetermined wage.

In analyzing the Davis-Bacon Act, as amended, the Supreme Court found that it represented a balancing between the interests of laborers and of contractors. The contractor's interest lies in being able to "know definitely in advance of submitting his bid what his approximate labor costs will be," while the laborers' interest lies in protecting local wage standards. Universities Research Assn. v. Coutu, 450 U.S. at 773, 775, 782. There is no reason to believe that the interests Congress sought to balance in enacting § 5310 are any different.

In the instant case, the predetermination of prevailing wage rates by the Secretary of Labor provided CPC with certainty when preparing its bid. Plaintiffs do not challenge the Secretary's determination in this regard. Any private enforcement, pursuant to § 1983, of the contractor's obligation to pay would not upset the contractor's interest in having a predetermined wage rate to factor into a bid. Thus a private right of action pursuant to § 1983 does not upset

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[15] Because this issue is not before the Court in the instant action, it is not necessary to decide that matter. However, under the Davis-Bacon Act, the correctness of the Secretary's wage rate determination is not subject to judicial review. Universities Research Assn. v. Coutu, 450 U.S. at 761 n.10 (citing United States v. Binghamton Constr. Co., 347 U.S. 171, 177 (1954)).

the balance of Congress' "carefully tailored scheme" that is at the heart of § 5310.

Defendants point to the finding of the Supreme Court in Universities Research Assn. v. Coutu, 450 U.S. at 783, that, "[t]he implication of a private right of action here would undercut as well the elaborate administrative scheme promulgated pursuant to Reorganization Plan No. 14." The issue in Coutu, however, was whether the Davis-Bacon Act conferred a private right of action on an employee under a contract that had been predetermined by the Secretary of Labor not to call for Davis-Bacon work. Thus the employee in Coutu was challenging a predetermination ruling by the Secretary of Labor concerning whether a contract is covered by Davis-Bacon. If contractors had to worry that such predetermination rulings might be upset in judicial post-contract coverage rulings, the benefit of a predetermination ruling would be largely lost, i.e., contractors would not be able to accurately forecast their labor costs. It was this need for consistency, in determining which contracts are covered under Davis-Bacon and which are not, that the Coutu court had in mind when it concluded that, "[w]hatever may be the merits of allowing judicial review of these complex coverage determinations prior to contracting, it clearly would be inappropriate for a court to substitute its judgment for that of a contracting agency in a private action brought after the contract was let." Id. at 784. This conclusion is not, however, applicable in a situation, such as is presented in the instant case, where coverage is not in dispute and employees merely seek to

enforce that which was already predetermined: that § 5310 applies to the contract.

Defendants assert that allowing § 1983 right of action would contravene the purpose of the Reorganization Plan, as incorporated into § 5310, which is to "assure coordination of administration and consistency of enforcement of the labor standards." (emphasis added) However, as the President's transmittal message makes clear, this "consistency of enforcement" refers to a consistent approach to enforcement across government agencies, and thus would not preclude private enforcement:

> the Federal agencies involved in the administration of the various acts [including the Davis-Bacon Act] are divided into two classes: (1) agencies which contract for Federal public works or construction; and (2) agencies which lend or grant Federal funds . . . to aid in the construction of projects to be built by State or local public agencies or private individuals and groups. The methods of enforcing labor standards necessarily differ between these two groups of agencies.
>
> The methods adopted by the various agencies for the enforcement of labor standards vary widely in character and effectiveness. As a result, uniformity of enforcement is lacking and the degree of protection afforded workers varies from agency to agency.

> In order to correct this situation, this plan authorizes the Secretary of Labor to coordinate the administration of legislation relating to wages and hours on federally financed or assisted projects by prescribing standards, regulations and procedures to govern the enforcement activities of the various federal agencies and by making such investigations as he deems desirable to assure consistent enforcement.

Reorganization Plan Number 14 of 1950, Message of the President, 5 U.S.C. App. (emphasis added). Thus, the Reorganization Plan was designed to remedy inconsistent application of federal labor standards by federal administrative agencies. This congressional and presidential interest in a uniform approach to enforcement by federal agencies would not be undermined by a § 1983 right of action. Certainly there is no evidence that Congress or the President even considered private enforcement when they placed the "consistency of enforcement" language in the Reorganization Plan.

Furthermore, it cannot be said that the administrative enforcement scheme established pursuant to § 5310 is "sufficiently comprehensive" to preclude a § 1983 right of action. Unlike the comprehensive enforcement schemes in Sea Clammers and Smith v. Robinson, neither § 5310 nor the Reorganization Plan contain provisions for private judicial remedies. The federal regulation which establishes a procedure for the resolution of disputes concerning payment of wages under the Reorganization

Plan, 29 C.F.R. § 5.11(a), does not allow an employee to initiate such a procedure.[16] Only after a ruling on a wage dispute by the Administrator of the Department of Labor's Wage and Hour Division or an ALJ does an employee have an opportunity to initiate an action: he or she may appeal the ruling to the Wage Appeals Board, pursuant to 29 C.F.R. § 7.1 et seq.. There is, however, no right to judicial review of the Wage Appeals Board decision, except for procedural appeals under the Administrative Procedure Act. Although these opportunities for employees to enforce wage determinations are significant, they do not rise to the level of being "sufficiently comprehensive."

Finally, defendants' well-researched history of the Davis-Bacon Act and the various congressional efforts to amend the Davis-Bacon Act, in order to explicitly provide private judicial remedies, does not persuade the Court that Congress intended to preclude § 1983 actions under § 5310.

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[16] 29 C.F.R. § 5.11(a) provides that:

> This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay or proper classification. The procedures in this section may be initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency . . . . or upon request of the contractor or subcontractor(s).

(emphasis added).

Although the congressional reasons for enacting § 5310 undoubtedly mirror, in large part, the rationale behind the Davis-Bacon Act, as amended, it is important to keep in mind that there are fundamental differences between the two laws. Of greatest significance, the Davis-Bacon Act regulates contracts to which the federal government is a party and therefore there can be no § 1983 state action remedy. Thus, on the numerous occasions when Congress considered, and ultimately rejected, the creation of a private right of action under the Davis-Bacon Act, Congress could not have had in mind the preclusion of a § 1983 remedy, as no such remedy was then (or is now) available under the Davis-Bacon Act. Section 5310, in contrast, regulates contracts between a state or local government unit and contractor, and thus there may be state action for purposes of a § 1983 action. For this reason, the legislative history of the Davis-Bacon Act cannot be seen as demonstrating congressional intent to preclude a § 1983 remedy under § 5310. Finally, there is absolutely no evidence in the legislative history of the HCDA itself that Congress sought to foreclose a § 1983 remedy under § 5310.

Defendants have not demonstrated that: (a) the § 5310 administrative enforcement scheme is sufficiently comprehensive; (b) a § 1983 remedy would skew a carefully tailored enforcement scheme; or (c) there is any evidence in the text or legislative history of the HCDA of congressional intent to preclude a § 1983 action under § 5310. For these reasons, this Court finds that defendants have not met their heavy burden of proving that Congress intended to foreclose § 1983 enforcement of § 5310.

D. Plaintiff's Implied Private Right of Action Claim

1. The Existing Framework

"[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Cannon v. University of Chicago, 441 U.S. 677, 688 (1979). Rather courts must determine whether a federal statute creates an implied private right of action by applying the four-factor analysis of Cort v. Ash, 422 U.S. 66 (1975), which asks: (1) is plaintiff one of the class for whose especial benefit the statute was created?; (2) is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?; (3) is it consistent with the underlying purposes of the legislative scheme to imply such remedy?; and (4) is the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law?

The implied private right of action analysis under Cort, although related, is distinctly different from the § 1983 analysis discussed supra. As the Supreme Court recently wrote:

> The [four factored Cort] test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. Because § 1983 provides an "alternative source of express congressional

> authorization of private suits," these separation of powers concerns are not present in a § 1983 case. Consistent with this view, we recognize an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy.

Wilder v. Virginia Hospital Association, 110 S.Ct. at 2517, n.9 (citations omitted).

While courts continue to apply Cort's four factors, it is the second factor, legislative intent, that is the primary focus in determining whether there is an implied private right of action.[17] Thompson v. Thompson, 484 U.S. 174, 179 (1988); Transamerica Mortage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979); Saltzman v. Farm Credit Services, 950 F.2d 466, 467-68 (7th Cir. 1991). Legislative intent may be found in the language or structure

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[17] Justice Scalia argues that the Supreme Court has "effectively overruled" the four-factor Cort analysis in Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979) and in Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979), thereby converting Cort's second factor (i.e. congressional intent) into "the determinative factor", with the other three merely indicative of the presence or absence of such intent. Thompson v. Thompson, 484 U.S. 174, 188-89 (1988) (Scalia, J., concurring) (emphasis in original).

of the statute or in some other source. Thompson v. Thompson, 484 U.S. at 179 (citing Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 94 (1981)). This inquiry requires "a very close, even mocroscopic, examination of the legislative history of the particular statute involved." Davis v. United Air Lines, 662 F.2d 120, 123 (2d Cir. 1981), cert. denied, 456 U.S. 965 (1982).

A party may show legislative intent without having to demonstrate that Congress simply forgot to create a private right of action:

> [o]ur focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action. Rather, as an implied cause of action doctrine suggests, "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." We therefore have recognized that Congress' "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment."

Thompson v. Thompson, 484 U.S. at 179 (citations omitted) (emphasis in original).

Courts should generally not find an implied private right of action in a given statute when Congress has expressly provided a different remedy. Karahalios v. National Federation of Federal Employees, Local 1263, 489 U.S. 527, 533 (1989) ("It is . . . an "elemental canon" of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. In such cases, 'in the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.'" (quoting Middlesex County Sewerage Authority v. Sea Clammers, 453 U.S. 1, 15 (1981) (other citations omitted)). However, "[t]he fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section." Cannon v. University of Chicago, 441 U.S. 677, 711 (1979).

2. The Existing Framework as Applied to 42 U.S.C. § 5310

In determining whether § 5310 creates an implied private right of action, it is the second Cort factor, legislative intent, which will be this Court's primary focus.[18]

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[18] For the reasons stated in Section C.2.b., supra, the Court finds that plaintiffs were one of the class for whose (continued...)

As discussed above, courts generally should not find an implied private right of action in a given statute when Congress has expressly provided a different remedy in that same part of the statute. Karahalios v. National Federation of Federal Employees, Local 1263, 489 U.S. at 533. Thus, while there is "an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy," Wilder v. Virginia Hospital Association, 110 S.Ct. at 2517 n.9, the presumption in implied private right of action lawsuits is drawn in precisely the opposite direction: when Congress has expressly provided other remedies in connection with a particular section of a statute, no other remedies are to be implied "in the absence of strong indicia of contrary congressional intent." Karahalios v. National Federation of Federal Employees, Local 1263, 489 U.S. at 533.

Congress has already created other tools for enforcement of § 5310. The Reorganization Plan provides for an administrative enforcement mechanism. This Court has found that laborers and mechanics have a § 1983 right of action. Because Congress has created these remedies and there is no strong indication that Congress intended to create additional remedies, this Court finds that no implied private right of action exists under § 5310.

CONCLUSION

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[18] (...continued)
especial benefit § 5310 was created. Thus, the first prong of the Cort test favors plaintiffs in the instant action.

For the foregoing reasons, defendants' motions to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P., are denied with respect to plaintiff's claims brought under 42 U.S.C. § 1983 and granted with respect to those claims brought pursuant to an asserted implied private right of action under 42 U.S.C. § 5310. In addition, that part of municipal defendants' motion brought pursuant to Rule 12(b)(1), Fed. R. Civ. P. is denied.[19] The magistrate

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[19] Municipal defendants paint a doomsday scenario if their motion is not granted and this Court finds a § 1983 remedy, asserting that this would "generate thousands of new cases for the already overburdened federal courts," that "[p]ublic contracting where Davis-Bacon was applicable would likely become impossible," and that "many municipalities would decline to accept HCDA money and, thus, . . . the purposes for which HCDA was designed would no longer be served." Memorandum of Law in Support of Municipal Defendant's Motion to Dismiss the Complaint at 122-23. While municipal defendants' dire predictions may or may not prove to be correct, it is not the function of this Court to play prognosticator, nor to deny a meritorious claim because it might invite other claims which would place a potentially heavy financial burden on municipalities. As discussed above, the Court finds that the elements necessary to establish a § 1983 right of action are present in § 5310. Furthermore, this decision relies on the specific language of § 5310, which differs, in important respects, from the language of the Davis-Bacon Act, as well as many of the other statutory provisions that refer to the wage-setting standards of the Davis-Bacon Act, such as 42 U.S.C.

(continued...)

judge's findings and recommendations are modified in accordance with this opinion.

Inasmuch as the Court declines the municipal defendants' request to certify this case for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the parties are directed to complete discovery by August 28, 1992 and to file a joint pre-trial order by September 25, 1992.

It is so ordered.

Dated: New York, New York
June 5, 1992

U.S.D.J.

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[19] (...continued)
§ 1437j and 33 U.S.C. § 1372. Thus this opinion is quite limited in its scope. Certainly if municipal defendants' parade of horribles does come to pass, Congress is free to prohibit a § 1983 right of action under § 5310 or any other statute.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 90 Civ. 5653 (RJW), DATED SEPTEMBER 8, 1992

KAM SHING CHAN, KAM TAI CHAN, JING YI CHEN, SHAN NON CHIU, BAK LOK CHU, KOK KUN CHU, ISRAEL GONZALEZ, SUI BIN HUANG, JIAN NING JIANG, KAM FAI KWOK, MOON SHUEN KWONG, WEI XIANG LEE, YANG I LEE, YOUNG SHI LEE, BING ZHAO LI, HAO HUI LI, KEI MAN LI, WAI TAI LI, CHI KWONG LIU, JACK YE LOUIE, SHENG HUA LU, TING GUANG MAI, CHEUK MING NG, KIN CHUNG NG, KIN HIN NG, SHUN GUO SHEN, TEN JEN SHEN, HAU WING SIN, VEIN DINH SINTRUONG, WING SHING TSE, WAI MAN WAN, KONG HTYAN WU, XU MING WU, GUO XUAN, YUE NAM ZHU,

Plaintiffs,

- against -

CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, and CHINESE-AMERICAN PLANNING COUNSEL, INC.,

Defendants.

OPINION

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APPEARANCES

ELLEN DICHNER
JAMES REIF
Gladstein, Reif & Meginniss
361 Broadway
New York, New York 10013

MICHAEL SHEN
Shneyer & Shen
250 West 100th Street
New York, New York 10025

Asian American Legal Defense
and Education Fund
99 Hudson Street
New York, New York 10013

Attorneys for Plaintiffs

O. PETER SHERWOOD
Corporation Counsel of the City of
New York
100 Church Street
New York, New York 10007

BETH PERITZ
GOODWIN E. BENJAMIN
JOHN P. WOODS
Of Counsel

Attorney for Defendants City of New York and Department of Housing Preservation and Development of the City of New York

JAY W. WAKS
PETER A. WALKER
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, New York 10022

JAY S. BERKE
NICHOLAS J, PAPAS
Skadden, Arps, Slate, Meagher & Flom
919 Third Avenue
New York, New York 10022

Attorney for Defendant Chinese-American Planning Council, Inc.

WARD, District Judge.

Defendants City of New York ("the City") and the Department of Housing Preservation and Development of the City of New York (collectively "municipal defendants") and Chinese-American Planning Counsel, Inc. ("CPC") have each moved, pursuant to Local Civil Rule 3(J), USDC, SDNY, for reargument of that portion of this Court's Opinion and Order dated June 5, 1992 (the "June 5, 1992 Opinion and Order") in which the Court "decline[d] the municipal defendants' request to certify this case for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)". Kam Shing Chan and the other plaintiffs (collectively "plaintiffs") oppose the instant motions. For the reasons that follow, the Court: (1) deems defendants' motions for reargument to be motions to modify the June 5, 1992 Opinion and Order; and (2) grants these motions, thereby certifying this case for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). In all other respects, the Court adheres to its June 5, 1992 Opinion and Order.

BACKGROUND

The relevant background to the underlying action is contained in the June 5, 1992 Opinion and Order at 3-6.

On June 3, 1992, approximately one month after oral argument on defendants' motions to dismiss and two days before the Court issued its opinion on those motions, municipal defendants submitted a short letter, containing little supporting authority, to the Court seeking certification of an interlocutory appeal pursuant to 28

U.S.C. § 1292(b). Prior to issuance of the June 5, 1992 Opinion and Order, no other party made any submissions on this subject to the Court. In its June 5, 1992 Opinion and Order, this Court declined to certify the case for interlocutory appeal, and the instant motions followed.

DISCUSSION

A. Defendants' Motions for Reargument

A party may move for reargument pursuant to Local Civil Rule 3(j) only upon an assertion that "the court has overlooked 'matters or controlling decisions' which, had they been considered, might reasonably have altered the result reached by the court." Adams v. United States, 686 F. Supp. 417, 418 (S.D.N.Y. 1988) (quoting Local Civil Rule 3(j), USDC, SDNY), quoted in Schonberger v. Serchuk, 742 F. Supp. 108, 119 (S.D.N.Y. 1990).

In addition, "a party making a motion for reargument may not, under [Local] Civil Rule 3(j), advance new facts, issues or arguments not previously presented to the Court." Schonberger v. Serchuk, 742 F. Supp. at 119.

In light of the fact that neither CPC nor plaintiffs briefed the § 1292(b) certification issue prior to issuance of the June 5, 1992 Opinion and Order, and that municipal defendants' letter seeking certification cited little authority in support of municipal defendants' position, it is clear that, in the context of the instant motions for reargument, each of which presents a great deal of

supporting authority, all parties are "advanc[ing] new facts, issues or arguments not previously presented to the Court." Accordingly, this Court would be compelled to deny defendants' motions for reargument pursuant to Local Civil Rule 3(j).

However, because the issues concerning § 1292(b) certification have only now been fully briefed, in the context of defendants' motions for reargument, it is appropriate to treat these issues as before the Court for the first time. For this reason, the Court deems the instant motions to be motions to modify the June 5, 1992 Opinion and Order. Accordingly, the Court now turns to the merits of the parties' arguments.

B. Certification of an Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)

Defendants seek an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), which provides, in relevant part, that

> [w]hen a district judge, in making in a civil action an order not otherwise appealable under [section 1292], shall be of the opinion that such order [(1)] involves a controlling question of law [(2)] as to which there is substantial ground for difference of opinion and that [(3)] an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of

> Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

(emphasis added). The Second Circuit recently has "urged[d] the district courts to exercise great care in making a § 1292 (b) certification[, because] the district courts are presumed to be more familiar with a case than is the court of appeals prior to briefing and argument." Westwood Pharmaceuticals Inc. v. Nat'l Fuel Gas Distrib. Corp., 964 F.2d 85, 89 (2d Cir. 1992). Furthermore, only "exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978), quoted in Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 25 (2d Cir. 1990). With these general admonitions in mind, the Court now turns to the three-pronged test of § 1292(b) to ascertain whether the exceptional circumstances of this case suggest that certification is appropriate.

1. Is there a Controlling Question of Law?

There can be little doubt that the issues defendants seek to appeal, concerning whether plaintiffs have a right of action pursuant to 42 U.S.C. § 1983, "importantly affect the conduct of [this] action," see In re Duplan Corp., 591 F.2d 139, 148 n.11 (2d Cir. 1978) and the sources cited therein. As defendants have correctly noted, if the Court of Appeals determines that plaintiffs have no § 1983 right of action, this Court may be compelled to

dismiss plaintiff's other claims as well, either under a theory of preemption or because the only remaining claims would be pendent state claims. Thus, a ruling by the Court of Appeals in favor of defendants could result in dismissal of this lawsuit.

Plaintiffs assert that the precedential value of the June 5, 1992 Opinion and Order and any appellate review will be limited. The Court agrees with plaintiffs on this point. See June 5, 1992 Opinion and Order at 44-45, n.19. However, it is not necessary for the resolution of a question to be of great precedential value in order for that question to be "controlling." Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d at 24.

For these reasons, the Court finds that its June 5, 1992 Opinion and Order does involve a controlling question of law.

2. **Is there a Substantial Ground for Difference of Opinion?**

The issues addressed in the June 5, 1992 Opinion and Order involved matters that were both difficult and of first impression. See Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d at 25 (noting with approval the district court's conclusion that, when the issues before the district court on a motion for certification pursuant to 28 U.S.C. § 1292(b) were "difficult and of first impression," there were "substantial grounds for difference of opinion"). Although this Court found that there is a § 1983 right of action under 42 U.S.C. § 5310, the conclusions reached by

the Court were by no means the only reasonable conclusions an impartial arbiter could reach. The Court was presented with two close questions concerning whether Congress intended to (1) create a "right" under § 5310 and (2) foreclose § 1983 enforcement of § 5310. The Court obviously believes it answered these questions correctly. However, primarily because there was no explicit indication in the text of § 5310 or in its legislative history to guide an arbiter in answering these questions, the Court cannot say that there is no "substantial ground for difference of opinion." Accordingly, defendants have met the second prong of the § 1292 (b) test.

3. **Might an Immediate Appeal from the Order Materially Advance the Ultimate Termination of the Litigation?**

If defendants are successful on appeal and the Second Circuit dismisses the § 1983 claims, there is a substantial likelihood that the amount of discovery and corresponding district court time will be reduced dramatically, perhaps even entirely. Given the number of plaintiffs already involved in this litigation, and their pending motion for class certification, there is a significant amount of discovery to be conducted simply to determine the extent of each plaintiff's participation in CPC's training programs. The fact that plaintiffs seek class certification and that certain aspects of discovery involve translations from Chinese to English adds an additional level of complexity to this action. For these reasons, a successful appeal by defendants would materially advance the ultimate

termination of the litigation and would, in all likelihood, preserve scarce resources of the parties and the judiciary.

CONCLUSION

Defendant's motions for reargument pursuant to Local Civil Rule 3(j), USDC, SDNY are deemed by this Court to be motions to modify the June 5, 1992 Opinion and Order. For the reasons stated supra, this Court finds that the June 5, 1992 Opinion and Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the opinion and order may materially advance the ultimate termination of the instant litigation. Except to the extent indicated above, nothing in this opinion and order shall be construed to modify the June 5, 1992 Opinion and Order.

It is so ordered.

Dated: New York, New York
September 8, 1992

U.S.D.J.

No. 90 Civ. 5653 (RJW)

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JANUARY 4, 1993 GRANTING CERTIFICATION PURSUANT TO F.R. Civ. P. 54(b)

KAM SHING CHAN, KAM TAI CHAN, JING YI CHEN, SHAN NON CHIU, BAK LOK CHU, KOK KUN CHU, ISRAEL GONZALEZ, SUI BIN HUANG, JIAN NING JIANG, KAM FAI KWOK, MOON SHUEN KWONG, WEI ZIANG LEE, YANG I LEE, YOUNG SHI LEE, BING ZHAO LI, HAO HUI LI, KEI MAN LI, WAI TAI LI, CHI KWONG LIU, JACK YE LOUIE, SHENG HUA LU, TING GUANG MAI, CHEUK MING NG, KIN CHUNG NG, KIN HIN NG, SHUN GUO SHEN, TEN JEN SHEN, HAU WING SIN, VEIN DINH SINTRUONG, WING SHING TSE, WAI MAN WAN, KONG HTYAN WU, XU MING WU, GUO XUAN, YUE NAM ZHU,

Plaintiffs,

- against -

CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, and CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Defendants.

Plaintiffs allege that defendant Chinese-American Planning Council, Inc. ("CPC") unlawfully failed to pay them wages at not less than prevailing wage rates as determined by the United States Secretary of Labor, and that defendants City of New York and Department of Housing Preservation and Development ("HPD") caused this failure. Plaintiffs assert causes of action under 42 U.S.C. § 1983, 42 U.S.C. § 5310, contracts between CPC and HPD, New York Labor Law § 198 and New York common Law.

All defendants moved pursuant to F.R. Civ. P. 12 to dismiss the federal statutory claims. By decision dated June 5, 1992, this Court granted the motions in part and denied them in part. The motions to dismiss the claims brought under § 5310 were granted; the motions to dismiss those claims asserted under § 1983 were denied. The Court held that § 5310 does not create an implied cause of action to remedy violations of that statute and, hence, that plaintiffs had failed to state a claim under § 5310 upon which relief might be granted. On the other hand, the Court held that § 1983 does provide plaintiffs with a cause of action to remedy the violations of § 5310 alleged and that the circumstances alleged, if proven, would establish action by CPC under color of state law.[1]

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[1] This Court has made no order with respect to the sufficiency of any of plaintiffs' causes of action other than their federal statutory claims, and no motions pertaining to these other claims are pending.

Defendants thereafter moved pursuant to 28 U.S.C. 1292(b) to certify for interlocutory appeal that part of the Court's order denying the motions to dismiss the § 1983 claims. By decision dated September 8, 1992, said motions were granted. Defendants then moved for leave from the Court of Appeals to take such interlocutory appeals. By orders dated November 10, 1992, the Court of Appeals granted said motions for permission to appeal.

Defendants have now requested that, pursuant to F.R. Civ. P. 54(b), this Court direct entry of a final judgment as to the claims brought directly under § 5310. Plaintiffs have expressly consented to such a final judgment.

After due consideration of the matter, this Court hereby directs entry of a final judgment as to plaintiffs' causes of action brought pursuant to § 5310. In the circumstances presented, there is no just reason for delaying the Court of Appeals' consideration of the § 5310 claims. To the contrary, the interests in sound judicial administration and efficiency will be served thereby.[2]

The questions (a) whether § 1983 expressly creates a cause of action to enforce § 5310 and (b) whether § 5310 implicitly creates a cause of action to enforce § 5310 are not the same. Nevertheless, the respective analyses necessary to resolve these two legal questions are related, at least in

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[2] This order is predicated on the assumption that entry of such a final judgment will not unduly delay consideration and disposition of the pending appeals on the § 1983 claims.

part, and parallel each other. It would be most sensible to enable the Court of Appeals to consider these questions at the same time. As noted, that Court has already accepted for interlocutory review defendants' appeal from that portion of the June 5 order denying the motions to dismiss the § 1983 claims. Entry of a final judgment as to that portion of the June 5 order granting the motions to dismiss the § 5310 causes of action will permit an immediate appeal from the latter order. Staff Counsel for the Court of Appeals has advised that an appeal on the § 5310 claims will be consolidated with the already pending appeal on the § 1983 claims and that the latter appeal will be delayed only approximately two weeks as a consequence. In these circumstances, the interests in efficiency and sound judicial administration strongly support entry of a final judgment as to that portion of the June 5 order granting the motions to dismiss the § 5310 claims.

Accordingly, it is so ordered.

DATED: NEW YORK, NEW YORK
January 4, 1993

U.S.D.J.

90 Civ. 5653 (RJW)

FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK ENTERED
JANUARY 11, 1993, DISMISSING IMPLIED RIGHT OF
ACTION CLAIMS

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KAM SHING CHAN, KAM TAI CHAN, JING YI CHEN, SHAN NON CHIU, BAK LOK CHU, KOK KUN CHU, ISRAEL GONZALEZ, SUI BIN HUANG, JIAN NING JIANG, KAM FAI KWOK, MOON SHUEN KWONG, WEI ZIANG LEE, YANG I LEE, YOUNG SHI LEE, BING ZHAO LI, HAO HUI LI, KEI MAN LI, WAI TAI LI, CHI KWONG LIU, JACK YE LOUIE, SHENG HUA LU, TING GUANG MAI, CHEUK MING NG, KIN CHUNG NG, KIN HIN NG, SHUN GUO SHEN, TEN JEN SHEN, HAU WING SIN, VEIN DINH SINTRUONG, WING SHING TSE, WAI MAN WAN, KONG HTYAN WU, XU MING WU, GUO XUAN, YUE NAM ZHU,

Plaintiffs

- against -

CITY OF NEW YORK, DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, and CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Defendants.

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All defendants having moved pursuant to F.R. Civ.P. 12 to dismiss the federal statutory claims, and the said motions having come before the Honorable ROBERT J. WARD, U.S.D.J., thereafter the Court having granted in part and denied them in part by decision dated June 5, 1992, defendant having requested that, pursuant to F.R. Civ.P. 54(b), the Court directs entry of a final judgment as to the claims brought directly under Section 5310, and the Court thereafter on January 5, 1993, having handed down its certification pursuant to F.R.Civ.P. 54(b); directing entry of a final judgment as to plaintiff's causes of action brought pursuant to Section 5310, and in the circumstances presented, there is no just reason for delaying the Court of Appeals' consideration of the Section 5310 claims, and entering final judgment as to that portion of the June 5 order granting the motions to dismiss the Section 5310 claims, it is,

ORDERED, ADJUDGED AND

DECREED: That defendants' motions to dismiss the federal statutory claims be and they are hereby granted in part and denied in part, and it is further,

ORDERED, that plaintiffs' claims brought under 42 U.S.C. Section 5310 be and they are hereby dismissed pursuant to the Court's decision dated June 5, 1992.

DATED: NEW YORK, NEW YORK
January 11, 1993

_____
Clerk

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE FRANCIS, DATED JANUARY 6, 1992

KAM SHING CHAN, KAM TAI CHAN, JING YI CHEN, SHAN NON CHIU, BAK LOK CHU, KOK KUN CHU, ISRAEL GONZALEZ, SUI BIN HUANG, JIAN NING JIANG, KAM FAI KWOK, MOON SHUEN KWONG, WEI XIANG LEE, YANG I, LEE, YOUNG SHI LEE, BING ZHAO LI, HAO HUI LI, KEI MAN LI, WAI TAI LI, CHI KWONG LIU, JACK YE LOUIE, SHENG HUA LU, TING GUANG MAI, CHEUK MING NG, KIN CHUNG NG, KIN HIN NG, SHUN GAO SHEN, TEN JEN SHEN, HAU WING SIN, VEIN DINH SINTRUOG, WING SHING TSE, WAI MAN WAN, KONG HTYAN WU, XU MING WU, GUO XUAN, YE NAM ZHU,

Plaintiffs,

- against -

THE CITY OF NEW YORK, THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, and CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Defendants.

REPORT AND RECOMMENDATION

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TO THE HONORABLE ROBERT J. WARD, U.S.D.J.:

In this action, Kam Shing Chan and the other plaintiffs (collectively referred to as "Chan") seek to recover backwages that they claim are due them under 42 U.S.C. § 5310 and applicable contracts, together with liquidated damages and attorneys' fees, from defendants City of New York ("City"), the Department of Housing Preservation and Development of the City of New York ("HPD") (collectively, the "municipal defendants") and the Chinese-American Planning Council, Inc. ("CPC"). The defendants now move to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, arguing that § 5310 does not give rise either to a cause of action under 42 U.S.C. § 1983 nor to an implied private right of action. For the reasons that follow, I recommend that the motion be granted.

Background & Statutory Scheme

Plaintiffs are laborers that defendant CPC employed under a contract with the municipal defendants. The Housing and Community Development Act of 1974 ("HCDA"), 42 U.S.C. § 5301 et seq., supplied the federal funds for construction carried out under this contract. § 5310, which governed the plaintiffs' rate of payment, provides in relevant part:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance under this

> chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a--276-a-5 .... The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of Title 40.

Thus, § 5310, incorporates the wage standards of the Davis-Bacon Act (the "Act").

The Davis-Bacon Act has its origins in the Depression. See Universities Research Association v. Coutu, 450 U.S. 754, 773-74 (1981). It was meant to guarantee that federal construction projects would benefit local workers by paying them at the prevalent local rate rather than relying upon a workforce of lesser paid outsiders. Id. The provisions of the Miller Act of August 24, 1935, 40 U.S.C. Section 270a et seq. ("Miller Act"), add to the Davis-Bacon Act a procedure for ensuring that the local rate will be paid. Id. at 775-77. If wages paid fall short of those required by a contract containing Davis-Bacon Act stipulations, the difference will be paid at completion of the project out of a bond that the contractor is required to post with contracting federal agencies. If the bond is not large enough to make up this difference, the Miller Act further provides laborers and mechanics with a private right of action against the contractor for any backwages still due.

Subsequently Congress authorized the Secretary of Labor under the Reorganization Plan Numbered 14 of 1950 ("Reorganization Plan") to make reasonable regulations to ensure compliance with the Davis-Bacon Act and related statutes. See Universities Research Association v. Coutu, 450 U.S. at 759 & nn. 6-7; Janik Paving & Construction, Inc. v. Brock, 828 F.2d 84, 89 (2d Cir. 1987). The regulatory regime established under the Reorganization Plan allows contractors and laborers to challenge the setting and application of Davis-Bacon wage standards, 29 C.F.R. §§ 5.11, 5.13 7.1, and provides for contractors to be debarred for up to three years from eligibility for applicable contracts as a deterrent to the willful violation of labor standards in federal contracting. Id. at 91. Significantly, the Reorganization Plan does not provide for an action by laborers for backwages claimed under the Davis-Bacon standards.

Congress enacted the HCDA in 1974. Under the doctrine of the "new federalism," Congress sought to spur development by means of "block grants" to state and municipal governments, in contrast to Depression-era development programs administered through federal agencies. Congress wished to guarantee that contractors on federally funded projects under this new arrangement would continue to pay at the prevailing local rate, and so incorporated in § 5310 both the Davis-Bacon wage standards and the administrative scheme established to ensure compliance with them. However, HCDA did not provide the equivalent of the Miller Act provisions conferring a private right of action for backwages on laborers and

mechanics working under a contract containing Davis-Bacon wage stipulations.

Plaintiffs contend that CPC failed to pay wages at the level established by the Secretary of Labor under the Davis-Bacon Act and applicable to their employment under § 5310. They further allege that this failure constitutes state action under § 1983 because of the responsibility to oversee wage determinations placed on the municipal defendants under HCDA and because the municipal defendants conspired with CPC. Defendants respond that the regulations promulgated under the Reorganization Plan lodge in the Secretary of Labor exclusive authority for hearing disputes arising out of Davis-Bacon wage stipulations. Defendants argue that Congress has precluded either a § 1983 action under § 5310 or an implied private right of action by providing a detailed administrative scheme and by choosing to omit from § 5310 the equivalent of the private right of action for backwages supplied by the Miller Act. However, plaintiffs state that § 5310 does not provide an administrative means for recovery of backwages due under the Davis-Bacon standards and argue that an implied private right of action is therefore necessary to achieve the purposes of § 5310. To illustrate this, plaintiffs cite the response of the Secretary of Labor to their complaint that CPC underpaid them under the Davis-Bacon standards. The Secretary of Labor has determined that CPC owes its employees $2,005,791.16 in backwages and has requested a "restitution" of this amount. (See Dep't of Labor Letter of 2/5/91 to CPC Exec. Dir. Charles Pei Wang, attached as App. A to Def. CPC's Reply Br.)

Discussion

A. Standard for Dismissal

In considering a motion to dismiss, whether for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, or for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), the Court must accept the allegations of the complaint as true. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); see also Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1098 (2d Cir. 1988), cert. denied, 440 U.S. 1007 (1989). Furthermore, the Court should not dismiss the complaint pursuant to either Rule 12(b)(1) or Rule 12(b)(6) "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

B. § 1983

The plaintiffs claim that the municipal defendants and CPC conspired to violate their rights under § 5310 and that § 1983 affords them a remedy. However, a plaintiff alleging a violation of a federal statute will not be permitted to sue under § 1983 if the statute "[does] not create enforceable rights, privileges, or immunities within the meaning of § 1983." Wilder v. Virginia Hosp. Ass'n, ___ U.S. ___, 110 S.Ct. 2510, 2517 (1990) (quoting Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 423 (1987)). In Universities Research Association, Inc. v. Coutu, the Supreme Court determined

that the Davis-Bacon Act does not confer rights on laborers and mechanics, but rather imposes a duty on federal agencies to ensure that the provisions required by the Davis-Bacon Act are included in federal contracts to which the Act applies. 450 U.S. at 772 & n.23 (1981).

Although plaintiffs distinguish between § 5310 and the Davis-Bacon Act, there is no reason why the Coutu analysis should not be followed here. Surely it would be anomalous if in incorporating the Davis-Bacon standards into the HCDA, Congress conferred rights upon laborers and mechanics employed under § 5310 that it withheld in enacting the Davis-Bacon Act. The language and legislative history of § 5310 reveal a legislative intent to impose on federal agencies the duty of ensuring that contracts include the Davis-Bacon wage stipulations and to provide the means to enforcement available under the Reorganization Plan regulatory regime. Significantly, the Reorganization Plan allows laborers and mechanics to challenge the determination and application of Davis-Bacon wage standards and provides debarment from contracts as a deterrent from willful violation of Davis-Bacon wage standards. See, e.g., Janik Paving and Construction, Inc., 828 F.2d at 91. In contrast, where Congress has chosen to confer rights, as well as impose duties on federal agencies, it has so provided. See, e.g., id. at 86 (provision of contractor liability for direct payment to affected employees, in addition to Reorganization Act debarment proceedings, for willful violation of Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-333).

However, even if § 5310 created a right, § 1983 requires that the conduct complained of be committed by a "person who may fairly be said to be a state actor." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). Plaintiffs allege that defendant CPC acted under the color of state law in denying them the salary levels required under § 5310. However, CPC's relationship with the state actors -- the City and HPD -- was contractual. There is no indication of the joint participation demonstrating a "close nexus" between the private and public parties that must be present to give rise to state action. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). As in Hadges v. Yonkers Racing Corp., 918 F.2d 1079 (2d Cir. 1990), where there was "no evidence that a State Official participated in [the private party's] decision to deny [the plaintiff's] application [for employment]," the municipal defendants' link to the rate at which the plaintiffs were paid is "too tenuous" to constitute state action, 918 F.2d at 1083, since no state official participated in CPC's wage determinations. In addition, plaintiffs claim that project funding levels established by the City caused them to be underpaid and that under Department of Housing and Urban Development guidelines, the municipal defendants had supervisory responsibilities over the CPC's wage levels; see handbook attached as Ex. A to Aff. of James Reif of 1/23/91. However, neither extensive state regulation, Jackson, 419 U.S. at 350, nor funding, Blum v. Yaretsky, 457 U.S. 991, 1011 (1982), gives rise to state action by a private party.

The plaintiffs further allege that CPC conspired with the municipal defendants to deprive them of

the salary levels due under § 5310 and that CPC is consequently a state actor. However, "conclusory, vague or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss." Zemsky v. City of New York, 821 F.2d 148, 151 (2d Cir.) (quoting Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir.) (per curiam), cert. denied, 464 U.S. 857 (1983)), cert denied, 484 U.S. 965 (1987). Here the plaintiffs do not identify the individuals who entered into the purported conspiracy, when it began, nor how long it continued. Thus, the plaintiffs have also failed in their attempt to characterize their loss of wages as the result of CPC's conspiracy with a state actor.

C. Private Right of Action

Plaintiffs also claim that they are afforded a private right of action for the backwages stipulated by § 5310. Again plaintiffs insist on a distinction between the Davis-Bacon Act and § 5310; they argue that the Davis-Bacon Act creates an implied private right of action and also claim that decisions to the contrary are not applicable to § 5310. However, the incorporation of the Davis-Bacon provisions into § 5310 is more significant than plaintiffs recognize. In enacting § 5310, Congress expressly incorporated both the Davis-Bacon wage standards and the Davis-Bacon enforcement provisions but chose not to provide any equivalent of the Miller Act provision of a private right of action under the Davis-Bacon Act. Thus § 5310 and the Davis-Bacon Act are identical in all essentials but one, and that one supports a finding that

Congress did not intend to create a private right of action under § 5310.

Whether or not Congress intended a statute to create a right that is enforceable by a private cause of action is analyzed according to three factors: "[1] Was the plaintiff `one of the class for whose especial benefit the statute was enacted'...? [2] is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?...[3] is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" Cort v. Ash, 422 U.S. 66, 78 (1975) (citations omitted).

In Coutu the Supreme Court gave negative answers to the first and second Cort questions. First, the Court found that while the Davis-Bacon Act did benefit laborers and mechanics employed under a contract subject to the Davis-Bacon standards, it did not "confer rights directly" on them, but rather benefitted them as an indirect effect of the duty that it imposed on federal agencies contracting under the Davis-Bacon Act. Universities Research Association v. Coutu, 450 U.S. at 772 & n.23. Therefore, the Court concluded, the Davis-Bacon Act was not enacted for the especial benefit of mechanics and laborers. Id. Next, the Court examined the significance of the Miller Act provision of an express private right of action as an indication of legislative intent. Coutu presented the question of whether a cause of action could be inferred on behalf of an employee engaged in government work whose contract did not contain a Davis-Bacon wage standard provision. The Court observed that the inclusion of the Miller Act procedure in the Davis-Bacon Act "demonstrates

that... `when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.'" Universities Research Association v. Coutu, 450 U.S. at 773 (quoting Touche Ross, 442 U.S. at 572). Thus the provision of an express private right of action supported an inference that Congress did not intend to create an additional implied private right of action. The negative inference is at least as warranted in the instant case. Here Congress did provide that the plaintiffs' contracts would be subject to Davis-Bacon wage standards but nevertheless chose not [sic] provide an express private action equivalent to that under the Miller Act. As in Coutu, where Congress chose not to provide an express private right of action, it would be illogical to conclude that it intended to create an implied private right of action.

In sum, there is conclusive evidence of Congress's intent not to create an implied right of action under § 5310, and this evidence is bolstered by the determination that § 5310 does not confer rights directly on those in plaintiffs' position. It may be correct, as plaintiffs claim, that implication of a private cause of action would be consistent with the underlying purpose of § 5310, as the third Cort factor requires. However, each of the Cort factors is not necessarily "entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." Transamerica Mortgage Advisors. Inc. v. Lewis, 444 U.S. 11, 23-24 (1979); see also CETA Workers Organizing Committee v. New York, 617 F.2d 926, 932 n.2 (1980). As the Supreme Court stated in Coutu, "[T]he question whether a statute creates a private right of action is

ultimately `one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.'" Universities Research Association, Inc. v. Coutu, 450 U.S. at 770 (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979)). Since Congress considered that the purposes of § 5310 were sufficiently served without a private remedy, it is clear that § 5310 does not provide an implied private cause of action.

Conclusion

For the reasons set forth above, I recommend that the motion to dismiss be granted. Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10) days to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Robert J. Ward, room 2204, and to the chambers of the undersigned, Room 633.

Respectfully submitted

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE
JUDGE

Dated: New York, New York
January 6, 1992

Copies mailed this date to:

Ellen Dichner, Esq.
James Reif, Esq.
Gladstein, Reif & Meginniss
361 Broadway - Suite 610
New York, New York 10013

Michael Shen, Esq.
Shneyer & Shen
250 West 100th Street
New York, New York 10025

Asian American Legal Defense
and Education Fund
99 Hudson Street
New York, New York 10013

Jay S. Berke, Esq.
Special Counsel
Skadden, Arps, Slate, Meagher & Flom
919 Third Avenue
New York, New York 10022

Beth Peritz, Esq.
Assistant Corporation Counsel
100 Church Street
New York, New York 10007

STATUTORY PROVISIONS

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 5310 of Title I of the Housing Community and Development Act, 42 U.S.C. § 5310 provides, in pertinent part:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar

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construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. § 276a-276a-5): Provided, that this section shall apply to the rehabilitation of residential property only if such property contains not less than 8 units. The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan No. 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of Title 40.

The Davis-Bacon Act, 40 U.S.C. § 276(a) et seq., provides in pertinent part:

(a) The advertised specifications for every contract in excess of $2,000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the State of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work

in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there;....

Reorganization Plan No. 14 of 1950, 5 U.S.C. App., 64 Stat. 1267, provides:

In order to assure coordination of administration and consistency of enforcement of the labor standards provisions of each of the following Acts by the Federal agencies responsible for the administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies, and cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards, as he deems desirable, namely: (a) The Act of March 3, 1931 (46 Stat. 1494, ch. 411), as amended; (b) the Act of June 13, 1934 (48 Stat. 948, ch. 482); (c) the Act of August 1, 1892 (27 Stat. 340, ch. 352), as amended; (d) the Act of June 19, 1912 (37 Stat. 137, ch. 174), as amended; (e) the Act of June 3, 1939 (53 Stat. 804, ch. 175), as amended; (f) the Act of August 13, 1946 (60 Stat. 1040, ch. 958); (g) the Act of May 13, 1946 (60 Stat. 170, ch. 251), as amended; and (h) the Act of July 15, 1949, ch. 338, Public Law 171, 81st Congress, First Session.

The Elementary and Secondary Education Act of 1969, 20 U.S.C. §1232b, provides:

> Except for emergency relief under section 241-1 of this title, all laborers and mechanics employed by contractors or subcontractors on all construction and minor remodeling projects assisted under any applicable program shall be paid wages at rates not less than those prevailing on similar construction and minor remodeling in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended [40 U.S.C.A. §276a et seq.]. The Secretary of Labor shall have, with respect to the labor standards specified in this section, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 and section 276c of Title 40.

The Headstart Economic, Opportunity and Community Partnership Act of 1974, 42 U.S.C. §2992a, provides:

> All laborers and mechanisms employed by contractors or subcontractors in the construction, alteration, or repair, including painting or decorating, of buildings or other facilities in connection with projects assisted under this subchapter, shall be paid wages at rates not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in

accordance with the Davis-Bacon Act [40 U.S.C.A. §276a et. seq.]. The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950, and section 276c of Title 40.

Section 6881(h) of the Energy Conservation and Production Act, 42 U.S.C. §6881(h) provides:

> All laborers and mechanics employed in construction, alteration, or repair which is financed by an obligation guaranteed under subsection (a) of this section shall be paid wages at rates not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act [40 U.S.C.A. §276a et seq.]. The Secretary shall not guarantee any obligations under subsection (a) of this section without first obtaining adequate assurance that these labor standards will be maintained during such construction, alteration, or repair. The Secretary of Labor shall, with respect to the labor standards in this subsection, have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 and section 276c of Title 40.

The Commercial Fisheries Research and Development Act of 1964, 16 U.S.C. §779(e)(b) provides:

> All laborers and mechanics employed by contractors or subcontractors on all construction projects assisted under this chapter shall be paid wages at rates no less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended [40 U.S.C.A. §276a et seq.], and shall receive overtime pay in accordance with and subject to the provisions of the Contract Work Hours Standards Act [40 U.S.C.A. §327 et seq.]. The Secretary of Labor shall have with respect to the labor standards specified in this section the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 and section 276c of Title 40.

The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450e(a), provides, in pertinent part:

> (a) All laborers and mechanics employed by contractors of [sic] subcontractors in the construction, alteration, or repair, including painting or decorating of buildings or other facilities in connection with contracts or grants entered into pursuant to this Act, shall be paid wages at not less than those prevailing on similar construction in the

locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494), as amended [40 U.S.C.A. §276a et seq.]. With respect to construction, alteration, or repair work to which the Act of March 3, 1921 [sic] is applicable under the terms of this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950, and section 276c of Title 40.

Section 5046 of the Domestic Volunteer Services Act of 1973, 42 U.S.C. §4950, et seq. provides:

All laborers and mechanics employed by contractors or subcontractors in the construction, alteration, or repair, including painting and decorating of projects, buildings and works which are federally assisted under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a--276a-5). The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and in section 276c of Title 40.

The Emergency Community Facilities Act of 1970, 42 U.S.C. § 3107 provides:

> All laborers and mechanics employed by contractors or subcontractors on projects assisted under sections 3102 and 3103 of this title shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended. No such project shall be approved without first obtaining adequate assurance that these labor standards will be maintained upon the construction work. The Secretary of Labor shall have, with respect to the labor standards specified in this section, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950, and section 276c of Title 40.

Section 8775 of the Energy Security Act, 42 U.S.C. §8701, et seq., provides:

> The provisions of the Act entitled "An Act Relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (40 U.S.C. 276a et seq.) and commonly known as the Davis-Bacon Act, and the provisions of the Service

Contracts Act [41 U.S.C.A §351 et seq.] shall apply to the [United States Synthetic Fuels] Corporation as if it were an agency of the United States. All laborers and mechanics employed for the construction, repair, or alteration of synthetic fuel projects funded, in whole or in part, by the Corporation pursuant to section 8732, 8733, or 8736 of this title shall be paid wages at rates not less than those prevailing on projects of a similar character in the locality as determined by the Secretary of Labor in accordance with the Act commonly known as the Davis-Bacon Act [40 U.S.C.A. §276a et seq.]. The Corporation shall not extend any loan or loan guarantee for construction, repair or alteration of a synthetic fuel project unless a certification is provided to the Corporation prior to the commencement of construction, or at the time of filing an application for a loan or loan guarantee if construction has already commenced, that these labor standards will be maintained at the synthetic fuel project. The Secretary of Labor shall have, with respect to the labor standards specified in this subsection, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 and section 276c of Title 40.

The National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. §954(n), provides:

> It shall be a condition of the receipt of any grant under this section that the group or individual of exceptional talent or the State or State agency receiving such grant furnish adequate assurances to the Secretary of Labor that all laborers and mechanics employed by contractors or subcontractors on construction projects assisted under this section shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended [40 U.S.C.A. §276a et seq.]. The Secretary of Labor shall have with respect to the labor standards specified in this subsection the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 and section 276c of Title 40.

The Older Americans Acts of 1965, 42 U.S.C. §3027(a)(14)(D) provides:

> The plan shall provide, with respect to the acquisition (in fee simple or by lease for 10 years or more), alteration, or renovation of existing facilities (or the construction of new facilities in any area in which there are no suitable structures available, as determined by the State agency, after full

consideration of the recommendations made by area agencies on aging, to be a focal point for the delivery of services assisted under this subchapter) to serve as multipurpose senior centers, that--

* * *

(D) the plan contains or is supported by adequate assurance that any laborer or mechanic employed by any contractor or subcontractor in the performance of work on the facility will be paid wages at rates not less than those prevailing for similar work in the locality as determined by the Secretary of Labor in accordance with the Act of March 3, 1931 (40 U.S.C.A. §§276a--276a-5; commonly known as the Davis-Bacon Act), and the Secretary of Labor shall have, with respect to the labor standards specified in this subparagraph, the authority and functions set forth in reorganization plan numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267), and section 276c of Title 40; and

The Solid Waste Disposal Act, 42 U.S.C. §6979 provides:

No grant for a project of construction under this chapter shall be made unless the Administrator finds that the application contains or is supported by reasonable assurance that all laborers and mechanics employed by contractors or subcontractors on

projects of the type covered by the Davis-Bacon Act, as amended (40 U.S.C. 276a--276a-5), will be paid wages at rates not less than those prevailing on similar work in the locality as determined by the Secretary of Labor in accordance with that Act; and the Secretary of Labor shall have with respect to the labor standards specified in this section the authority and functions set forth in Reorganization Plan Numbered 14

The Hospital Survey and Construction Act, 42 U.S.C. §291, et. seq. provides:

For each project pursuant to a State plan approved under this part, there shall be submitted to the Surgeon General, through the State agency, an application by the State or a political subdivision thereof or by a public or other nonprofit agency. If two or more such agencies join in the project, the application may be filed by one or more of such agencies. Such application shall set forth--

* * *

(5) reasonable assurance that all laborers and mechanics employed by contractors or subcontractors in the performance of construction or modernization on the project will be paid wages at rates not less than those prevailing on similar work in the locality as determined by the Secretary of

Labor in accordance with the Davis-Bacon Act, as amended [40 U.S.C. 276a et seq.]; and the Secretary of Labor shall have with respect to the labor standards specified in this paragraph the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176) and section 276c of Title 40; and

29 C.F.R. § 1.10 (1974) provides:

§ 1.10 **Hearings.**

Whenever he deems it necessary because of insufficiency of information or impracticality of a field survey, or both, the Administrator may direct a hearing to be held. He shall request the Chief Hearing Examiner, U.S. Department of Labor, to designate a hearing examiner who shall, after notice to all interested persons, proceed to the project area and make such investigations and conduct such hearings as may be necessary to make a determination of wage rates for the project.

29 C.F.R. §§ 1.13 1-1.16 (1974) provides:

§ 1.13 Submission of hearing examiner's proposed decision to interested persons.

A copy of the hearing examiner's proposed decision shall be mailed to each interested person appearing at the hearing.

§ 1.14 Exceptions of interested persons.

Any intered person may within 5 days after receipt of the hearing examiner's proposed decision file his exceptions thereto. Such exceptions shall be filed with the Chief Hearing Examiner, U.S. Department of Labor, Washington 25, D.C. for transmission to the Administrator.

§ 1.15 Decision of Administrator.

The Administrator shall rule upon any exceptions filed under § 1.14, and shall make a determination as to the prevailing wage rates for the project.

§ 1.16 Review by Wage Appeals Board.

Any interested person may appeal to the Wage Appeals Board for a review of a determination of wage rates made under this part, or

any findings and conclusions made on the record of any hearings held under § 1.3(c). Any such appeal may, in the discretion of the Wage Appeals Board, be received, accepted, and decided in accordance with the provisions of 29 CFR Part 7 and such other procedures as the Board may establish.

29 C.F.R. § 5.6(a)(1)(1974) provides:

(a)(1) It shall be the responsibility of the Federal agency to ascertain whether the clauses required by § 5.5 have been inserted in the contracts. Agencies which do not directly enter into such contracts shall promulgate the necessary regulations or procedures to require that § 5.5 or such modifications thereof which have been approved by the Department of Labor. No payment, advance, grant, loan or guarantee of funds shall be approved by the Federal agency after the beginning of construction unless there is on file with the agency a certification by the contractor that he and his subcontractors have complied or that there is a substantial dispute with respect to the required provisions.

29 C.F.R. § 5.6(a)(3)(1974) provides (emphasis added):

> (3) In addition to the examination of payrolls and statements required by subparagraph (2) of this paragraph, the Federal agency shall cause investigations to be made as may be necessary to assure compliance with the labor standards clauses required by the regulations contained in this part and the applicable statutes listed in § 5.1. Projects where the contact is of short duration (6 months or less) shall be investigated before the work is accepted, if feasible. In the case of contracts which extend over a long period of time the investigation shall be made with such frequency as may be necessary to assure compliance. Such investigations shall include interviews with employees and examinations of payroll data to determine the correctness of classifications and disproportionate employment of laborers, helpers, or apprentices. Complaints of alleged violations shall be given priority and statements, written or oral, made by an employee shall be treated as confidential and shall not be disclosed to his employer without the consent of the employee.

29 C.F.R. § 5.6(b)(1)(1974) provides in pertinent part:

> (b)(1) Whenever any contractor or subcontractor is found by the Secretary of Labor or the Agency Head with the concurrence of the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in § 5.1 other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts subject to any of the statutes listed in § 5.1.

29 C.F.R. § 5.7(d)(1974) provides:

> (d) Contract termination. Where the contract is terminated by reason of violations of the labor standards a report shall be submitted to the Secretary of Labor and the Comptroller General giving the name and address of the contractor or subcontractor whose right to proceed has

been terminated, the name and address of the contractor or subcontractor, if any, who is to complete the work, the amount and number of his contract, and the description of the work he is to perform.

29 C.R.F. § 5.9 (1974) provides:

> In the event of failure or refusal of the contractor or any subcontractor to comply with labor standards stipulations required by the regulations contained in this part and the applicable statutes listed in § 5.1, the Federal agency shall take such action as may be necessary to cause the suspension of the payment, advance or guarantee of funds until such time as the violations are discontinued or until sufficient funds are withheld to compensate employees for the wages to which they are entitled and to cover any liquidated damages which may be due.

29 C.F.R. § 5.10 (1974) provides:

> (a) The Agency head may, in appropriate cases where violations of the labor standards clauses required by the regulations contained in this part and the applicable statutes listed in § 5.1 resulting in

underpayment of wages to employees are found to be nonwillful, request that restitution be made to such employees or on their behalf to plans, funds, or programs for any type of fringe benefit prescribed in the applicable wage determination.

(b) In cases where the Agency Head finds substantial evidence that such violations are willful and in violation of a criminal statute, the Agency Head shall forward the matter to the Attorney General of the United States for prosecution if the facts warrant. In all such cases the Secretary of labor shall be informed of the action taken.

29 C.F.R. § 5.11 (1974) provides in pertinent part (1974):

(a) The Secretary of Labor shall cause to be made such investigations as he deems necessary, in order to obtain compliance with the labor standards provisions of the applicable statutes listed in § 5.1, or to affirm or reject the recommendations by the Head of an agency for an appropriate adjustment inliquidated damages assessed under the Contract Work Hours and Safety Standards Act.

* * *

(b) In the event of disputes concerning the payment of prevailing wage rates or proper classifications which involve significant sums of money, large groups of employees, or novel or unusual situations, the Secretary of Labor may, upon request by a Federal agency, direct a hearing to be held. For the purpose of the hearing the Secretary of Labor shall, in writing, designate a hearing examiner who shall, after notice to all interested parties, make such investigation and conduct such hearings as may be necessary and render a decision embodying his findings and conclusions and if wages are found to be due, the amounts thereof. The hearing examiner's decision shall be sent to the interested parties and shall be final unless a petition for review of the decision by the Solicitor of Labor is filed by any such parties in quadruplicate with the Chief Hearing Examiner, United States Department of Labor, Washington 25, D.C., within 20 days after receipt thereof. The petition for review must set out separately and particularly each objection asserted. The petition for review and the record which shall include the examiner's decision then shall be certified by the hearing examiner to

the Solicitor of Labor. The petitioner may file a brief (original and four copies) in support of his petition within the 20-day period and any interested party upon whom the hearing examiner's decision has been served may within 10 days after the expiration of the time for filing the petition for review, file a brief in support of, or in opposition to the hearing examiner's decision. The Solicitor of Labor's decision shall be subject to such further review by the Wage Appeals Board, as it may provide in its discretion.

29 C.F.R. § 5.12 (1974) provides:

All questions arising in any agency relating to the application and interpretation of the rules contained in this part and in Parts 1 and 3 of this subtitle, and of the labor standards provisions of any of the statutes listed in § 5.1 shall be referred to the Secretary for appropriate ruling or interpretation. The rulings and interpretations shall be authoritative and those under Davis-Bacon Act may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). Requests for such rulings and interpretations should be addressed to the

Secretary of Labor, United States Department of Labor, Washington 25, D.C.